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v.
Gerald L. Morgan

Docketed:
April 27, 1987

Court: Supreme Court of Pennsylvania,
Western District

Counsel for appellant: Manion,Paul A.

Counsel for appellee: Campanella,Michael F.

Entry	Date	Note	Proceedings and Orders
1	Mar 2 1987		Application for extension of time to docket appeal and order granting same until April 27, 1987 (Brennan, March 3, 1987).
2	Apr 27 1987	G	Statement as to jurisdiction filed.
4	May 22 1987		Order extending time to file response to jurisdictional statement until June 11, 1987.
5	Jun 10 1987		Motion of appellee Gerald Morgan to dismiss or affirm filed.
6	Jun 11 1987	G	Motion of Association of American Railroads for leave to file a brief as amicus curiae filed.
7	Jun 16 1987		DISTRIBUTED. September 28, 1987
8	Jun 25 1987	X	Reply brief of appellant Monessen Southwestern Rwy Co. filed.
9	Sep 18 1987	X	Supplemental brief of appellant Monessen Southwestern Rwy Co. filed.
10	Oct 5 1987		Motion of Association of American Railroads for leave to file a brief as amicus curiae GRANTED.
11	Oct 5 1987		PROBABLE JURISDICTION NOTED.
			**********
12	Nov 19 1987	G	Motion of Association of American Railroads for leave to file a brief as amicus curiae filed.
13	Nov 20 1987		Joint appendix filed.
14	Nov 20 1987		Brief of appellant Monessen Southwestern Rwy Co. filed.
15	Dec 14 1987		Motion of Association of American Railroads for leave to file a brief as amicus curiae GRANTED.
16	Dec 23 1987		Brief of appellee Gerald L. Mprgan filed.
17	Jan 5 1988		CIRCULATED.
18	Jan 5 1988		SET FOR ARGUMENT. Monday, Februry 22, 1988. (2nd case). (1 hour).
19	Jan 21 1988	X	Reply brief of appellant Monessen Southwestern Rwy Co. filed.
20	Feb 22 1988		ARGUED.

JURISDICTIONAL

STATEMENT

86 1748

No. _____

FILED
MAY 27 1987
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CLERK

IN THE

Supreme Court of the United States

October Term, 1986

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT

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Questions Presented

1. Whether a state court rule (Pa.R.Civ. P. No. 238) authorizing an award of delay damages (prejudgment interest) of 10% per annum in common law bodily injury cases filed in state court violates federal law and the Supremacy Clause of Article VI of the Constitution of the United States when applied to a Federal Employers' Liability Act case brought in state court?

2. Whether the trial court's automatic adoption of Pennsylvania's "total offset" rule for reducing an award of future damages to their present value as a rule of decision in this FELA case violates the mandate of this Court in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983)?

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IN THE

Supreme Court of the United States

October Term, 1986

No. _____

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT

Introduction

Appellant, the Monessen Southwestern Railway Company (the "MSW"),[1] appeals from the final judgment of the Supreme Court of Pennsylvania, dated December 12, 1986.[2] In its opinion in support of that judgment,

[1] Pursuant to Rule 28.1, the MSW discloses that it is a wholly owned subsidiary of Wheeling-Pittsburgh Steel Corporation. MSW is not affiliated with any other publicly owned corporations.

[2] Appellant filed a notice of appeal from that judgment in the Supreme Court of Pennsylvania on February 27, 1987. By Order of March 3, 1987, this Court (Brennan, J.) granted appellant's motion for an extension of time to docket this appeal or to file a petition for a writ of certiorari in this Court to April 27, 1987.

Pennsylvania's highest court held (4-3) that application to this Federal Employers' Liability Act ("FELA") case of a state procedural rule (Pa.R.Civ.P. No. 238) providing for an award of damages for delay at the rate of 10% per annum in personal injury cases is not repugnant to federal law.[3] The court also held that the trial court's automatic application of Pennsylvania's "total offset" method for calculating loss of future earnings in common law personal injury actions as a binding rule of decision in this FELA case did not violate this Court's mandate in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

This Jurisdictional Statement is being submitted to demonstrate that this Court has jurisdiction over this appeal under 28 U.S.C. §1257(2) and that the questions presented are substantial and merit the plenary consideration of this Court.

Opinions Below

The Opinion of the Supreme Court of Pennsylvania is reported at _____ Pa. _____, 518 A.2d 1171 (1986), and appears in Appendix A hereto.

The Opinion of the Superior Court of Pennsylvania is reported at 339 Pa. Super. 466, 489 A.2d 254 (1985), and appears in Appendix B hereto.

The Opinion of the Court of Common Pleas of Allegheny County is unreported and appears in Appendix C hereto.

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[3] Although Pennsylvania's Rule 238 is phrased in terms of "damages for delay," the Pennsylvania courts have made it clear that such damages constitute prejudgment interest. *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 463 A.2d 147, 154 (1981), *appeal dismissed*, 456 U.S. 940 (1982).

Grounds of Appellate Jurisdiction

In the judgment and decision from which this appeal has been taken, the Supreme Court of Pennsylvania has sustained (4-3) the application in this FELA case of a state procedural rule providing for an award of prejudgment interest in the face of appellant's contention that such application is repugnant to applicable federal law. In its judgment, the court also upheld (4-3) the trial court's automatic application of Pennsylvania's "total offset" rule for calculating an award for impairment of future earning power as a binding rule of decision in this FELA action, notwithstanding this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), that such a choice must be deliberate and cannot be based on an assumption that state law compels it.

The judgment of the Supreme Court of Pennsylvania was entered on December 12, 1986. On February 27, 1987, appellant filed a timely notice of appeal to this Court with the Supreme Court of Pennsylvania (App. D). By order dated March 3, 1987, this Court (Brennan, J.) granted appellant an extension of time to April 27, 1987 to docket this appeal and file the within Jurisdictional Statement.

This Court has appellate jurisdiction over this appeal, pursuant to 28 U.S.C. §1257(2), because appellant has drawn into question the validity of a state procedural rule as applied to an FELA action on the ground of its being repugnant to the Constitution and laws of the United States, and the state courts have decided in favor of the validity of the state rule as applied. *See, Dickinson v. Stiles*, 246 U.S. 631 (1918).

A state court rule such as Pa.R.Civ.P. No. 238 is a state "statute" within the meaning of 28 U.S.C. §1257(2). *See Ohralik v. Ohio State Bar Association*, 436 U.S. 447

(1978); *In Re: Griffiths*, 413 U.S. 717 (1973). Moreover, the "validity" of the state statute is "sustained" for purposes of appellate review by this Court under 28 U.S.C. §1257(2) where, as here, the state courts hold the statute applicable in the face of a contention that such an application contravenes federal law. *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1971) (and cases cited therein); *Dahnke-Walker Milling Co. v. Bordurant*, 257 U.S. 282, 288-290 (1921).[4] Finally, the Supreme Court of Pennsylvania directly considered and passed on the federal question the MSW presents to this Court, concluding that Pa.R.Civ.P. No. 238 does not violate federal law when applied to FELA actions brought in Pennsylvania state courts.[5]

This Court's appellate jurisdiction extends as well to the question whether the trial court erred in automatically applying as a rule of decision in this FELA action Pennsylvania's "total offset" rule for reducing a future damage award to present value in violation of this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). *See, Cox Broadcast Corp. v. Cohn*, 420 U.S. 469, 487 n. 14 (1975) ("In finding we have appellate jurisdiction, we also take jurisdiction over any aspects of the case which would fall solely within our certiorari jurisdiction"); *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Check*, 259 U.S. 530, 547 (1922).

[4] More recent cases to the same effect in a federal pre-emption context include: *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. 2380, 2388 (1985); *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983); and *McCarty v. McCarty*, 453 U.S. 210, 219 (1981).

[5] In the event this Court determines that this appeal is improvidently taken, MSW requests the Court to regard and act on the within Jurisdictional Statement and related appeal papers as a Petition for Writ of Certiorari in accordance with 28 U.S.C. §2103.

Constitutional Provision and Statutes Involved

The Supremacy Clause of Article VI of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

28 U.S.C. §1257(2) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Pa.R.Civ.P. No. 238, 28 U.S.C. §1961 and 45 U.S.C. §56 are set forth in Appendix E hereto.

Statement of the Case

This FELA action was filed by plaintiff in the Court of Common Pleas of Allegheny County, Pennsylvania to recover damages for injuries allegedly sustained by him in the course of his employment with the MSW. At the conclusion of the evidence, the state trial judge ruled, on the basis of the decision of the Supreme Court of Pennsylvania in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), that it would apply the "total offset" rule of that case as a rule of decision with respect to any award for loss of future earnings and would not charge the jury that such an award must be reduced to present value. The MSW objected to this ruling. Thereafter, the jury returned a verdict in favor of plaintiff and against the MSW in the sum of $125,000.00.

By order dated December 15, 1981, the trial court molded the verdict to add an award of damages for delay pursuant to Pa.R.Civ.P. No. 238 (App. E, pp. 53a-54a). The amount, calculated at ten percent (10%) per annum, resulted in an additional award of $26,712.50 and a total verdict of $151,712.50. The trial court's order expressly noted an exception to defendant[6] (App. C, p. 36a).

The MSW filed post-trial motions which challenged the automatic adoption of the state supreme court's "total offset" rule as a binding rule of decision and the application of Pa.R.Civ.P. No. 238 to this FELA action. As to both of these points, the MSW argued that the measure of damages in FELA actions is exclusively a matter of federal law and that the trial court's

[6] In the state courts, plaintiff suggested that the MSW had failed to preserve its objection to the application of Rule 238. In light of defendant's exception, both the trial and appellate courts rejected this contention and addressed the issue on its merits.

application of Rule 238 and its automatic adoption of the state supreme court's "total offset" rule as a binding rule of decision in this FELA action violated applicable federal law. The MSW's post-trial motions were denied by order dated July 22, 1982 (App. C, pp. 37a-38a). Significantly, in attempting to justify its adoption of the "total offset" rule of the state court as a binding rule of decision in this FELA case, the trial court relied extensively on the decision of the United States Court of Appeals for the Third Circuit in *Pfeifer*, 678 F.2d 453 (3rd Cir. 1982) (App. C, p. 46a), the very decision which was later reversed by this Court.

On appeal, a three-judge panel of the Superior Court of Pennsylvania affirmed (App. B). The panel upheld the applicability of Pa.R.Civ.P. No. 238 to an FELA action tried in a Pennsylvania state court on the basis of its earlier decision in *Humphries vs. Pittsburgh & Lake Erie RR. Co.*, 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert. denied*, _____ U.S. _____, 106 S.Ct. 179 (1985). In *Humphries*, the Superior Court had held, in an FELA case, that "the allowance of such interest pursuant to Rule 238 comports with our understanding of the federal decisional law on the matter." 476 A.2d at 926. The Superior Court also affirmed the trial court's resolution of the present value issue.

The seven-member Supreme Court of Pennsylvania allowed the MSW's appeal. Thereafter, it affirmed, with three justices dissenting (App. A). As had the intermediate appellate court, the state supreme court found the trial court's automatic adoption of the state court's "total offset" rule reconcilable with this Court's decision in *Pfeifer*. The court also rejected the MSW's contention that the application of Pa.R.Civ.P. No. 238 to this FELA action was repugnant to federal law. The

court construed federal law, including 28 U.S.C. §1961, to be "permissive" on the matter of prejudgment interest and to allow such an assessment when predicated on state law. Citing Rule 238's purpose of prompting settlement of litigation and the state court's own "right" to institute measures to alleviate court congestion, the court stated that neither this goal nor the prejudgment interest provisions of Rule 238 contravened federal law. It, therefore, held that Rule 238 "is properly applied to FELA cases brought in Pennsylvania courts." (App. A, p. 17a).

The three dissenting justices disagreed with both rulings. They concluded that the trial judge had not deliberately considered alternative present value methods but had blindly followed the state court's "total offset" method, the very practice condemned by this Court in *Pfeifer*. Accordingly, the dissent stated that the damages found by the jury had not been reduced to present value as required by federal law (App. A, pp. 18a-21a).

The dissent also took exception to the majority's ruling on the applicability of Rule 238, finding that the "award of delay damages under Pa.R.C.P. 238 conflicts with federal law." Characterizing the majority's attempted justification for applying Rule 238 as "pure sophistry", the dissent concluded:

> "Application of our so-called procedural rule not only interferes with governing federal substantive law but undermines the national uniformity FELA was designed to achieve." (App. A, p. 21a).

The MSW has filed a timely appeal to this Court for review of both issues.[7]

[7] Sometime after the judgment of the Supreme Court of Pennsylvania was entered on December 12, 1986 and before the MSW filed this appeal on February 27, 1987, plaintiff demanded from the MSW's bonding company payment on a supersedeas bond which had been posted pending the appeal in the state courts. Without authorization of the MSW or its parent, Wheeling-Pittsburgh Steel Corporation ("W-P Steel"), both of which are in Reorganization Proceedings under Chapter XI of the Bankruptcy Act, the bonding company paid plaintiff the amount of the bond, which is less than the amount of the judgment with post-judgment interest. Plaintiff has retained his right to proceed against the MSW and W-P Steel for the balance. For their part, the MSW and W-P Steel have demanded that plaintiff and the bonding company return this partial payment. In these circumstances, it is clear that the bonding company's erroneous partial payment to plaintiff, for which the MSW seeks recovery, does not moot this appeal. *See Bank of Marin v. England*, 385 U.S. 99 (1966); *Cahill v. New York, New Haven & Hartford R.R. Co.*, 351 U.S. 183 (1956).

REASONS FOR PLENARY CONSIDERATION

I. Whether an Award of Prejudgment Interest in FELA Actions Violates Federal Law Presents a Question of National Importance and First Impression To This Court.

The propriety of applying a state rule providing for an award of prejudgment interest in common law, personal injury actions to an FELA action filed in state court presents an issue of substantial importance to railroads and railroad workers throughout the country. By its terms, the FELA does not authorize an award of prejudgment interest and this Court has never decided that such an award is permissible. Nor has this Court ever considered whether an element of an award rendered in an FELA action may be predicated solely on state law when the suit is litigated in state court. The decision of the Supreme Court of Pennsylvania in this case directly presents these issues. Moreover, this decision is in conflict with the rulings of other state and federal appellate courts which have held that federal law precludes such an award. (*See* cases cited in n.8, *infra*). The attention of this Court is warranted, therefore, to address this important question and to reconcile these conflicting opinions.

This is so because legal and financial responsibility for the work-related injuries of railroad employees is determined exclusively under the FELA. Congress has provided in the FELA that federal and state courts have concurrent jurisdiction over such actions. 45 U.S.C. §56. The right of action, the standards of liability and particularly the measure of damages, however, are to be determined exclusively according to a uniform body of federal law. *Norfolk and Western R. Co. v. Liepelt*, 444 U.S. 490 (1980).

The FELA's insistence on uniformity and nationwide application of federal law to such claims was born of Congressional dissatisfaction with the common law duty of master and servant and a recognition of the national character of the railroad industry. In order to provide predictability in the compensation process and strike a fair balance between workers and carriers, the FELA deliberately imposes, as a matter of federal law, a uniform system of recovery that equitably balances the cost of human injury and the inescapable expense of railroading. *See Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329, *reh. den.* 356 U.S. 978 (1958).

As the dissenting opinion of the Supreme Court of Pennsylvania points out, prejudgment interest in an FELA case may comprise a substantial segment of the award, as it did in this case (App. A, p. 21a). Whether, in light of the FELA's goal of uniformity and the absence of authorization for prejudgment interest in federal law, such awards are appropriately predicated on state law is an issue of importance to all participants in the railroad industry and upon which there is a conflict in the decisions. For these reasons, the question whether a state court may apply one of its procedural rules providing for an award of prejudgment interest to an FELA action merits the plenary consideration of this Court.

II. The Decision In Question Is At Variance With The Rulings Of The State And Federal Appellate Courts Which Have Considered the Issue.

By its terms, the FELA does not authorize an award of prejudgment interest. Accordingly, and in furtherance of the FELA's fundamental goal of achieving national uniformity, federal and state courts have since the

enactment of the FELA more than 75 years ago consistently held that prejudgment interest—whether asserted under federal or state law—is not awardable in FELA actions.[8] The only case to the contrary is a district court decision, *Garcia v. Burlington Northern RR. Co.*, 597 F. Supp. 1304 (D. Col. 1984) which is on appeal to the Tenth Circuit, *appeal docketed*, No. 84-1318 (10th Cir. March 6, 1984), and which appears to have been overruled by that court's intervening decision in *Wilson v. Burlington Northern RR. Co.*, 803 F.2d 563 (10th Cir. 1986).

The decision of the Supreme Court of Pennsylvania in this case to permit application of a state prejudgment interest rule to FELA actions marks a dramatic departure from this long-established line of cases. This conflict creates uncertainty which threatens the uniformity of standards under the Act—an uncertainty which should be resolved by this Court. Equally significant, the instant decision introduces alien state law rules into the calculation of damages under the FELA. It thereby both seriously undermines the national uniformity the FELA was designed to achieve and destroys the balance of equities between workers and railroads Congress has struck in the FELA.

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[8] *See e.g., Federal: Faulkenberry v. Louisiana & Arkansas Rwy. Co.*, 551 F.2d 650 (5th Cir.), *rehearing den.* 555 F.2d 1391 (1977); *Kozar v. Chesapeake & Ohio Rwy. Co.*, 449 F.2d 1238, 1244 (6th Cir. 1971); *Louisiana & Arkansas Rwy. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1942); *Chicago, M. St. P., P.R.R. v. Busby*, 41 F. 2d 617 (9th Cir. 1930); *State: Felder v. Union Pacific Railroad Co.*, 660 P.2d 911 (Colo. App. 1982); *Wicks v. Central Railroad Co. of New Jersey*, 129 N.J. Super. 145, 322 A.2d 488 (1974), *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974); *Murmann v. New York, New Haven & Hartford RR.*, 258 N.Y. 447, 180 N.E. 114 (1932).

III. Permitting State Courts To Apply Widely Variant Prejudgment Interest Rules To FELA Cases Will Undermine National Uniformity and Spawn Forum Shopping.

At present, thirty-two states allow some form of prejudgment interest in personal injury actions which could have application to FELA actions. *See* J. Wilson, J. Bosco and S. Malone, "Prejudgment Interest in Personal Injury, Wrongful Death and Other Actions," 30 Trial Lawyers Guide 105 (Oct. 1986). Twenty-seven of these states have allowed recovery for the first time since 1965. *Id.* The rules governing entitlement and calculation are set forth variously by state statute, court rule and decision. In addition to state-by-state differences on the recoverability of prejudgment interest, states permitting recovery diverge with respect to: (i) when and how entitlement to prejudgment interest accrues; (ii) whether, how and when a defendant can terminate plaintiff's right to interest; (iii) the standards or conditions for assessment; and (iv) the interest rate and time period according to which the award is calculated. *See id.* Moreover, of importance in the FELA context, the right to prejudgment interest has been resolved differently by state and federal courts within the same jurisdiction. *See, e.g., In Re Aircrash Near Chicago, Illinois*, 480 F.Supp. 1280 (N.D. Ill. 1979), *aff'd*, 644 F.2d 633 (7th Cir. 1981) and *Schultz v. Rockwell Mfg. Co.*, 438 N.E.2d 1230 (1983), *cert. denied*, 462 U.S. 1113 (1984).

Allowing the calculation of FELA awards to be substantially affected by the vagaries of state law necessarily produces a lack of uniformity. At present, the divergence among the states on the recoverability of

prejudgment interest, at what rates, and according to what standards is considerable. If the rule announced in this case stands, substantive state-by-state differences in FELA recoveries—one of the evils the FELA was intended to eradicate—will be unavoidable and substantial.

Nor are the consequences limited to calculation of the award. Selection of the forum is substantially affected. In Pennsylvania, for example, the choice is already stark. Two federal district courts in Pennsylvania have held that Pa.R.Civ.P. No. 238 cannot be applied to FELA actions. *Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44 (M.D. 1984); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125 (E.D. Pa. 1984). Thus, within the same jurisdiction, FELA litigants are faced with a significant federal-state court dichotomy that materially affects both the choice of forum and the amount awarded. These variances are inconsistent with Congress' intent to confer concurrent jurisdiction without any impairment of the basic uniform standards to be applied in FELA actions. These differences between state and federal courts in interpreting the FELA can be resolved only by this Court.

IV. The State Court's Blind Adoption of Pennsylvania's "Total Offset" Rule Violates The Mandate Of This Court In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

Since at least as long ago as 1916 (*Chesapeake & Ohio RR. Co. v. Kelly*, 421 U.S. 485 (1916)), and as recently as 1985 (*St. Louis Southwestern Rwy. Co. v. Dickerson*, 470 U.S. 409 (1985)), this Court has ruled consistently that awards of future lost earnings in FELA actions must be reduced to their present value. In *Jones & Laughlin Steel*

Corp. v. Pfeifer, 462 U.S. 523 (1983), this Court, reversing a decision of the United States Court of Appeals for the Third Circuit, held that it was error for a trial court automatically to apply Pennsylvania's "total offset" method for reducing such awards as a binding rule of decision in federal question cases. The Court ruled that the trial court "must make a deliberate choice, rather than assuming that it is bound by a rule of state law." 462 U.S. at 553.

In this case, the record establishes that the trial court automatically adopted Pennsylvania's "total offset" method as a binding rule of decision and did not make the deliberate choice mandated by this Court in *Pfeifer*. Indeed, the trial court purported to justify its blind adherence to the Pennsylvania rule, in large part upon the basis of the opinion of the Third Circuit in *Pfeifer*, which this Court later reversed (App. C, p. 46a). As the dissenting opinion of the Supreme Court of Pennsylvania in this case concludes:

> "Judge Finkelhor's comments reveal that she did not consider other methods, but blindly followed our teaching in *Bolubasz*, and that she disagrees with the concept of discounting to present value required by federal law. In addition, her reliance on *Liepelt* seems misplaced in light of the subsequent decisions in *Dickerson* and *Pfeifer*. A state judge is not free to consider the discounting question procedural in FELA cases because the United States Supreme Court has held it is substantive. *Liepelt, supra; Kelly, supra.* The damages found by the jury were not reduced to present value as required by federal law." (App. A, pp. 20a-21a).

This Court's decision in *Pfeifer* makes it clear that adoption of an appropriate method for reducing an FELA award for impairment of future earning power to its present value is a matter of substantial importance to FELA litigants. It is for this reason that this Court ruled that trial courts must make a deliberate choice in selecting an appropriate present value method rather than assuming that they are bound by state law rules. The decision of the Supreme Court of Pennsylvania in this case, affirming the trial court's violation of the mandate of this court in *Pfeifer*, compels reversal.

Conclusion

For the foregoing reasons, the MSW submits that the questions presented by this appeal are substantial and merit plenary consideration by this Court.

Respectfully submitted,

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Date: April 27, 1987

APPENDIX A

Judgment of the Supreme Court of Pennsylvania, Western District

SUPREME COURT OF PENNSYLVANIA
Western District

No. 63 W. D. Appeal Docket 1985

Appeal from the March 8, 1985 Order of the Superior Court at No. 849 Pittsburgh, 1982, Affirming the Order Dated July 22, 1982, and Judgment Entered July 27, 1982, of the Court of Common Pleas, Civil Division, of Allegheny County at No. GD79-23765.

399 Pa. Super. 465, 489 A.2d 254 (1985)

ARGUED: SEPTEMBER 15, 1986

GERALD L. MORGAN,

Appellee,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
a corporation,

Appellant.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the SUPERIOR COURT OF PENNSYLVANIA be, and the same is, hereby Affirmed.

/s/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

DATED: December 12, 1986

Appendix A—Judgment and Opinion of the Supreme Court of Pennsylvania dated December 12, 1986.

[J-152-1986]
IN THE
SUPREME COURT OF PENNSYLVANIA
Western District

No. 63 W.D. Appeal Docket 1985

Appeal from the March 8, 1985 Order of the Superior Court at No. 849 Pittsburgh, 1982, Affirming the Order Dated July 22, 1982 and Judgment Entered July 27, 1982, of the Court of Common Pleas, Civil Division, of Allegheny County at No. GD 79-23765.

399 Pa.Super. 465, 489 A.2d 254 (1985)

ARGUED: September 15, 1986

GERALD L. MORGAN,

Appellee,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
a corporation,

Appellant.

OPINION OF THE COURT

Justice Rolf Larsen Filed: December 12, 1986

The issues raised in this appeal are: (1) whether in an action for personal injuries under the Federal Employers Liability Act (FELA), 45 U.S.C. §51, *et seq.*, the "total offset method," established as the law in this jurisdiction by *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027

Appendix A—Judgment and Opinion of the Supreme Court of Pennsylvania dated December 12, 1986.

(1980), may be applied in calculating damages, and: (2) whether the prejudgment interest provisions of Pa.R.Civ.P. No. 238 may be applied to an FELA action tried in a Pennsylvania state court. The Superior Court, in affirming the trial court, held that use of the "total offset method" in this FELA case was proper and, approved the addition of prejudgment interest under Rule 238 to the verdict.

I.

On August 27, 1977, appellee, Gerald L. Morgan, sustained injuries to his back when he fell as he alighted from a railroad car while carrying out his duties of employment. The appellee alleged that his fall was caused by the negligence of his employer, appellant, Monessen Southwestern Railway Company. He initiated this suit under the provisions of the Federal Employers Liability Act, in the Court of Common Pleas of Allegheny County. At the conclusion of the trial, the appellant requested the trial judge to instruct the jury that any verdict for loss of future earnings must be *reduced* to present worth. The trial judge declined to give such an instruction. Instead, the judge instructed the jury on the total offset method for calculating damages.

The jury found in favor of the appellee and awarded him a verdict in the sum of $125,000. On motion of the appellee and pursuant to Rule 238 of Pa.R.Civ.P., the court added prejudgment interest to the verdict. The appellant filed post-trial motions seeking a judgment N.O.V. or in the alternative, a new trial. In these two motions, appellant alleged, inter alia, that the trial court erred in refusing to charge the jury that any award of future damages must be *reduced* to present value. The appellant also alleged that the trial court erred in

molding the verdict by adding "delay damages" pursuant to Rule 238. By order dated July 22, 1982, the lower court dismissed appellant's motions. The Superior Court affirmed. *Morgan v. Monessen Southwestern Railway Company*, _____ Pa. Super. _____, 489 A.2d 254 (1985). Relying on *Humphries v. Pittsburgh & Lake Erie Railroad Company*, 328 Pa. Super. 119, 426 A.2d 919 (1984), the Superior Court held that the use of the total offset method for determining present value of future damages was correct in this case. Further, the Superior Court concluded that "[T]he trial court's addition of delay damages to the jury's verdict was proper."

II.

In *St. Louis Southwestern Railway Co. v. Dickerson*, _____ U.S. _____, 105 S.Ct. 1347 (1985), the United States Supreme Court said:

> As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal. Although the Court's decisions in this area "point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure,'" *Brown v. Western R. of Alabama*, 338 U.S. 294, 296, 70 S.Ct. 105, 106, 94 L.Ed. 100 (1949); it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law. *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 493, 100 S.Ct. 755, 757, 62 L.Ed.2d 689 (1980).

The question then of whether it was error for the trial court to refuse to instruct the jury that an award for future damages must be reduced to present worth, and to charge instead on the total offset method, is governed by federal law. Citing the United States Supreme Court's Opinions in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) and *St. Louis Southwestern Railway Company v. Dickerson, supra.*, the appellant argues that, as a matter of federal law, awards of future damages in FELA actions must be reduced to present value. The appellant insists that the trial court's charge to apply the total offset rule of *Kaczkowski v. Bolybasz, supra.* in calculating future damages in this case is contrary to federal law and constitutes reversible error.

The case of *Jones & Laughlin Steel Corp. v. Pfeifer, supra.* involved a claim for injuries under the Longshoremen's and Harbor Workers Compensation Act, 44 Stat. 1426, 33 U.S.C. §904. The District Court, citing *Kaczkowski*, applied the total offset method for the calculation of damages and the Third Circuit Court of Appeals approved its use. The United States Supreme Court reversed and remanded, rejecting the Third Circuit's conclusion that the total offset method was a *mandatory* rule in the federal courts. The Court refused to adopt the total offset rule or any other rule as the exclusive method for calculating future damages in federal trials. The Supreme Court said:

> The litigants and the amici in this case urge us to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary

economy. We are not persuaded, however, that such an approach is warranted. (Citation omitted.) For our review of the [relevant] cases leads us to draw three conclusions. First, by its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream [of income] can never be predicted with complete confidence, any lump sum represents only a "rough and ready" effort to put the plaintiff in the position he would have been in had he not been injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and unpredictability create a substantial risk that the damage award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others.

These conclusions all counsel hesitation. Having surveyed the multitude of options available, we will do no more than is necessary to resolve the case before us. We limit our attention to suits under §5(b) of the Act, noting that Congress has provided generally for an award of damages but has not given specific guidance regarding how they are to be calculated.

Id. 103 S.Ct. at 2555. The court went on to observe:

In 1976, Professor Carlson of the Purdue University, economics department wrote an article in the American Bar Association Journal contending

that in the long run the societal factors, excepting price inflation—largely productivity gains—match (or even slightly exceed) the "real interest rate." *Carlson, Economic Analysis v. Courtroom Controversy,* 62 ABAJ 628 (1976). He thus recommended that the estimated lost stream of future wages be calculated without considering either price inflation or societal productivity gains. All that would be considered would be individual seniority and promotion gains. If this were done, he concluded that the entire market interest rate, including both inflation and the real interest rate, would be more than adequately offset.

Although such an approach has the virtue of simplicity and may even be economically precise, we cannot at this time agree with the Court of Appeals for the Third Circuit that its use is mandatory in the federal courts.

Id. 103 S.Ct. at 2556, 2557. The court further stated:

We do not suggest that the trial judge should embark on a search for "delusive exactness." It is perfectly obvious that the most detailed inquiry can at best produce an approximate result. And one cannot ignore the fact that in many instances the award for impaired earning capacity may be overshadowed by a highly impressionistic award for pain and suffering. But we are satisfied that whatever rate the District Court may chose to discount the estimated stream of future earnings, it must make a deliberate choice, rather than assuming that it is bound by a rule of state law.

Id. 103 S.Ct. at 2558.

In summary, the United States Supreme Court in *Pfeifer:* held that the total offset method adopted for use in Pennsylvania negligence cases is not a *mandatory* rule in federal trials; declined to adopt the total offset rule, or any rule, as the *mandatory* method for determining future damages in federal court cases; ruled that use of the total offset rule is not prohibited if the trial court finds it to be the appropriate method under the circumstances; and held that the trial court "must make a deliberate choice, rather than assuming that it is bound by a rule of state law." *Id.* Thus, in final analysis, the Supreme Court, limiting its attention to suits arising under §5(b) of the Longshoremen's and Harbor Workers Compensation Act, refused to adopt a mandatory rule and held that the total offset formula is a permitted method for calculating future damages in cases under that Act.

Even though *Pfeifer* involved a claim under Section 5 of the Longshoremen's and Harbor Workers Compensation Act, we believe the approval of the total offset rule as a permissive method in that case applies as well to the instant FELA action. We agree with the observation of the Superior Court that:

> . . . the reasoning in [Pfeifer] is applicable to FELA cases brought in state court since the FELA, like the Longshoremen's Act, provides generally for a damage award, but gives no specific guidance regarding how that award is to be calculated. *See* 45 U.S.C. §51; *Pfeifer,* 103 S.Ct. at 2555.

Morgan v. Monessen Southwestern Railway Company, 489 A.2d at 258.

The total offset method is the rule adopted by this court for application in negligence cases tried in Pennsylvania courts. The use of that method is permitted in federal trials where the district court makes a deliberate choice as to its application. *Jones & Laughlin Steel Corp. v. Pfeifer, supra.* The adoption of the total offset rule as the method to be used in calculating damages in negligence trials in Pennsylvania was made after a thorough consideration of various present worth theories and rules. It was deliberately selected by this Court as the rule that most nearly provides an injured claimant with damages to the full extent of the injuries sustained. *Kaczkowski v. Bolubasz,* 491 Pa. 561. In *Kaczkowski,* we stated:

> "Mindful of our goal that a damage award formula should strive to be efficient, predictable as well as accurate, in computing lost future earning capacity this Commonwealth adopts . . . the Alaska court's total offset approach to inflation and discounting to present value. We believe that this eclectic method best computes a damage award which will fairly compensate a victim to the full extent of his or her injuries and avoid unnecessary complexities likely to produce confusion although in reality contributing little to the degree of accuracy to be obtained."

Id. 491 Pa. at 579. We stated further:

> "An additional virtue of the total offset method is its contribution to judicial efficiency. Litigators are freed from introducing and verifying complex economic data. Judge and juries are not burdened with complicated, time consuming economic

> testimony. Finally, by eliminating the variables of inflation and future interest rates from the damage calculation, the ultimate award is more predictable."

Id., 491 A.2d at 593. Accordingly, we hold that the trial court's use of the total offset method to determine the present value of future damages in the instant FELA action satisfies the requirements of federal law as enunciated in *Pfeifer*.

Four days before the Superior Court filed its opinion in this case upholding the use of the total offset method, the United States Supreme Court, on March 4, 1985, decide the case of *St. Louis Southwestern Railway Company v. Dickerson*, 105 S.Ct. 1347 (1985) involving an FELA claim tried in the Missouri state courts. In *Dickerson*, the jury returned a verdict in favor of the appellee in the amount of $1,000,000. The appellant Railway Company appealed alleging that the trial judge erred in refusing to instruct the jury that any award for loss of future earnings must be reduced to present value. The Supreme Court noted that:

> The trial judge refused to submit the instruction because such an instruction was not provided for in the Missouri Approved Instructions promulgated by the Supreme Court of Missouri for use in FELA cases. Accordingly, the Missouri court instructed the jury on damages, in relevant part, as follows:
>
> "If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a

> result of the fall on December 11, 1978, mentioned in the evidence. Any award you make is not subject to income tax."

Id. 105 S.Ct. at 1348. The Court reasoned that the fact that an instruction on present value was not included in the Missouri Approved Instructions was insufficient reason, under federal law, to deny appellant's request for such an instruction. "Whether such an instruction should have been given is a federal question." *Id.* 105 S.Ct. at 1348. Citing *Chesepeake & Ohio R.C. v. Kelly*, 241 U.S. 485, the Court said: "[A] defendant in a FELA case is entitled to have the jury instructed that 'when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.' " *Id.* 105 S.Ct. at 1348, 1349. The court went on to say:

> ". . . Although our decision in *Jones & Laughlin* makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damage award is error . . ." 105 S.Ct. at 1349.

In *Dickerson*, the Missouri court gave no instruction at all concerning present worth. By contrast, in the instant case, the trial judge did instruct the jury on present value by charging on the total offset method. In applying the total offset method, future inflation and future interest rates are deemed equivalent thereby

eliminating the previous practice of *reducing* the award to reach present worth. Present worth is established by use of the total offset rule.[1] We believe that the instructions given by the trial judge in the present case adequately apprised the jury on present value and satisfies the ditates of *Dickerson*.

III.

Next, the appellant complains that the trial court erred in adding $26,712.50 to the verdict as prejudgment interest pursuant to Rule 238 of the Pa.R.Civ.P. The appellant argues that the measure of damages in FELA actions is a matter of federal law. Appellant insists that under federal law prejudgment interest may not be awarded in FELA cases.[2] It is urged that federal law permits interest only on a judgment. Appellant cites 28 U.S.C. §1961 which provides in relevant part:

[1] *See O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2nd Cir., 1984) (approved the district court's use of the total offset method to establish present value).

[2] In support of this proposition, appellant cites, inter alia, the following federal cases: *Faulkenberry v. Louisiana & Arkansas Railway Company*, 551 F.2d 650 (5th Cir.), *rehearing den.* 555 F.2d 1341 (5th Cir. 1977) (interest on judgment from date of judicial demand is contrary to law in the fifth circuit); *Kozar v. Chesapeake & Ohio Railway Company*, 449 F.2d 1238 (6th Cir. 1971) (error to add interest to sums awarded as damages from the date of the filing of the complaint; interest should be paid from the entry of judgment); *Louisiana & Arkansas Railway v. Pratt*, 142 F.2d 847 (5th Cir. 1942) (interest to be calculated from the date of entry of judgment). But see, *Garcia v. Burlington Northern Railroad Company*, 597 F.Supp. 1304 (1984) (U.S. District Court in Colorado allowed prejudgment interest in FELA case. The court found strong policy considerations in approving such an award—fairness and efficiency. It was found that granting prejudgment interest was fair in that it often was necessary to fully compensate an injured railroad worker. Such a rule also promoted efficiency in the courts by providing an incentive for early settlement.)

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by state law.

The Superior Court, citing its decision in *Humphries v. Pittsburgh & Lake Erie Railroad Company*, 328 Pa.Super. 119, 476 A.2d 919 (1984) as controlling, held that the addition of Rule 238 prejudgment interest to the jury verdict was proper.[3] In *Humphries*, the Superior court observed:

> [A]s is conceded by all concerned, and a review of the statute confirms this, the Federal Employers' Liability Act makes neither a provision allowing nor forbidding prejudgment interest such as was awarded by the trial court here.

Id. 476 A.2d at 922. The court went on to say:

> It is true that [28 U.S.C. §1961] has been construed in the context of the Federal Employers' Liability Act in *Louisiana & Arkansas Ry. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944), to encompass post judgment interest, or, at the most, an award of interest tabulated from the date a verdict is rendered to the date judgment is entered.
>
> • • • • • •
>
> Although the Fifth Circuit's position in *Pratt* has been followed in a number of state courts, we noticed that most recently this stance, as it affects Section 1961 and federal causes of action in regard thereto, has been altered. For example, in *Olsen v.*

Shell Oil Co., 708 F.2d 976 (5th Cir. 1983), an employee brought suit against his employer under the Outer Continental Shelf Lands Act (OCSLA) for injuries he sustained while on the job. The employer contended, *inter alia*, that the district court should not have awarded prejudgment interest in light of Section 1961's prohibition against same, and he cited a number of Fifth Circuit cases in support of the contention. Circuit Judge Patrick E. Higgenbotham, speaking for the Court, admitted that there existed a conflict in the circuit as to the law on this point.

In response to this diversity of opinion that had manifested itself in the circuit, the Court opted to renounce its former, unfavorable position on the issue of prejudgment interest and adopted, instead, a posture consonant with that espoused in *Ellis v. Cherron U.S.A., Inc.*, 650 F.2d 94 (5th Cir. 1981). In doing so, the Court made statements that are quite germane to the case at bar; viz.:

> [I]n *Ellis*, an OSCLA wrongful death case, we upheld a denial of prejudgment interest once again, but only on the ground that the district court had "properly exercised its discretion." 650 F.2d at 98. The panel there read 28 U.S.C. §1961 as mandating postjudgment interest but also permitting prejudgment interest. Thus, it concluded that the district court "could have left intact its award of prejudgment interest if it found 'other principles of law' which justified the award . . ." *Id.* (quoting *Illinois Central Railroad*

> *Co. v. Texas Eastern Transmission Corp.*, 551 F.2d 943, 944 (5th Cir. 1977)).
>
> We think *Ellis* is the better view. *Ellis* reads the federal interest statute as permissive on the matter of prejudgment interest.

Id. 476 A.2d at 923. The Superior Court concluded that *Olsen* endorsed "the awarding of prejudgment interest to a plaintiff, who sues under a federal state, *when the remedy is based upon and supported by the state law where the district court sits.*" (Emphasis in original.) *Id.* 476 A.2d at 924. We agree.

> State and Federal Courts exercise concurrent jurisdiction over cases arising under the Federal Employers' Liability Act. Interest is essentially a question of local law; and, for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied whenever it is practical to do so." (Footnotes omitted.)

Louisiana & Arkansas Railway v. Pratt, 142 F.2d at 849, 850.

On November 20, 1978, we promulgated Rule 238, which states in part as follows:

> "(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the Court . . . shall

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[1] *Morgan v. Monessen Southwestern Railway Company*, ____ Pa. Supra. ____, 489 A.2d 254 (1985).

"(1) Add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict, or decision:

* * * * * * *

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until the commencement of trial, but the offer is not accepted and the plaintiff does not recover but award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the Court or the arbitrators shall not award damages for delay for the period after the date the offer was made . . ."

In *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, _____ A.2d _____ (1981) we said that "[T]he format of Rule 238 is responsive to its fundamental goal of prompting meaningful negotiations in major cases so as to unclutter the courts." This worthy goal in no manner conflicts with the purpose of the FELA, nor do the prejudgment interest provisions of Rule 238 contravene any provision of the federal act. This Court has the right to institute procedural rules designed to alleviate congestion in the trial courts. Cases brought under the FELA, as well as other federal statutes, contribute to such congestion the same as cases

instituted under state laws. A rule of procedure,[4] such as Rule 238, which does not conflict with any provision of the FELA is properly applied to FELA cases brought in Pennsylvania courts.[5]

The order of the Superior Court is affirmed.

Mr. Justice Hutchinson filed a dissenting opinion joined by Mr. Justice McDermott and Mr. Justice Zappala.

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[4] In *Laudenberger*, we said that Rule 238 was a rule of procedure "aimed at furthering litigation in a meaningful way while protecting the rights of the litigants." *Id.*, 496 Pa. at 65. We stated that the purpose and effect of Rule 238 are procedural though there may be a collateral effect on the substantive right of both parties. *Id.*

[5] In the recent case of *Craig v. Magee Memorial Rehabilitation Center*, _____ Pa. _____, _____ A.2d _____ (1986), this Court suspended the operation of the *mandatory* provisions of Rule 238 and directed the following post-trial procedure:

> [W]e direct that claims for delay damages are to presented in petition within five days of a jury verdict or arbitration award. Within five days thereafter the respondent's answer shall be due. If the plaintiff's recovery resulted from a jury verdict, the judge who presided over the trial is to consider the petition and answer. Prior to reaching a decision, the judge may hold a hearing to resolve any factual disputes. If the plaintiff's recovery resulted from an arbitration proceeding, the parties' petition and answer shall be submitted to the next available arbitration panel, and a hearing shall be conducted to resolve any factual disputes. Thereafter a decision shall be rendered, awarding or denying delay damages consistent with Pa.R.Civ.P. 238(a)(1).

In *Craig* though, it was held that "the suspension of the mandatory initiated provisions of Rule 238 is to be given prospective effect only" *Id.*, _____ Pa. at p. _____. The appellant in the instant case did not assert an attack on the Rule on the grounds that it offended due process by failing to provide a forum to assess fault for delay as held in *Craig*. The post-trial procedure adopted in *Craig* therefore, is not applicable here.

Appendix A—Judgment and Opinion of the Supreme Court of Pennsylvania dated December 12, 1986.

[J-152-86]
SUPREME COURT OF PENNSYLVANIA
Western District

No. 63 Western District
Appeal Docket, 1985

Appeal from the March 8, 1985 Order of the Superior Court at No. 849 Pittsburgh, 1982, Affirming the Order Dated July 22, 1982, and Judgment Entered July 27, 1982, of the Court of Common Pleas, Civil Division, of Allegheny County at No. GD79-23765.

399 Pa.Super. 465, 489 A.2d 254 (1985)

ARGUED: SEPTEMBER 15, 1986

GERALD L. MORGAN,

Appellee,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
a corporation,

Appellant.

DISSENTING OPINION

Hutchinson, J. Filed: December 12, 1986

I dissent. FELA cases brought in state courts are subject to state procedure, but the governing substantive law is federal. *St. Louis Southwestern Railway Co. v. Dickerson*, ____ U.S. ____, 105 S.Ct. 1347 (1985). The majority correctly states that the

Appendix A—Judgment and Opinion of the Supreme Court of Pennsylvania dated December 12, 1986.

measure of damages in these cases is a matter of federal substantive law, *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980); *Chesepeake & Ohio Railroad Co. v. Kelly*, 241 U.S. 485 (1916). Under longstanding federal precedent those damages must be discounted to present value. *Id.* Though the United States Supreme Court has not established a particular method for discounting damages to present value, it has given us guidance on the selection of a method. In *Jones and Laughlin Steel Corp. v. Pfeifer*,[1] 462 U.S. 523 (1983), the court held that the judge is not bound to follow state law on discounting to present value and, indeed, may not blindly follow the state procedure.[2] *Id.* 550-53.

In *Pfeifer*, the judge blindly applied the total offset method we adopted in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). This records shows that the trial judge did the same thing.

> [H]owever, we have reached the decision not to give the present-worth charge; and the basis for the Court's decision is the Bolubase [sic] Decision and the opinion of Justice Nix.
>
> As we read his [Chief Justice Nix] language [in *Bolubasz*], it appears to me that what he is doing is establishing, really, a procedural method for calculating an award for loss of future earnings; and that if you look at his opinion as being procedural, then it seems to me that it would be applicable.

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[1] As the majority notes, *Pfeifer* arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950; however, the same federal law on damages applies.

[2] We may label discounting as procedural for our own purposes. Nevertheless, it retains its substance for FELA purposes.

The other reason that compels the Court is that there is dicta in a number of these cases to the effect that until there has been some clear decision in FELA cases by the United States Supreme Court, the law of form [sic] should apply.

. . . .

The third reason [is] [a]fter years of listening to that charge on present worth that is given to juries, I think it is a charade. I don't think the jury understands what you are saying. I am not sure the judge understands, him or herself, what is being said. It just doesn't mean anything.

. . . I don't think that that is the way that you calculate damages.

And, I guess, the fourth reason would be that I view this recent decision . . . the Liepelt case that we had been looking at . . . as an attempt to put reality into the calculations of damages. . . .

It is the Court's feeling that the reduction to present worth has occurred by the next method; and we have to move on; so that the decision has been made.

Reproduced Record at 68a-70a.

Judge Finkelhor's comments reveal that she did not consider other methods, but blindly followed our teaching in *Bolubasz*, and that she disagrees with the concept of discounting to present value required by federal law. In addition, her reliance on *Liepelt* seems misplaced in light of the subsequent decisions in

Dickerson and *Pfeifer*. A state judge is not free to consider the discounting question procedural in FELA cases because the United States Supreme Court has held it is substantive. *Liepelt, supra; Kelly, supra.* The damages found by the jury were not reduced to present value as required by federal law.[3]

Likewise, I believe that the trial court's award of delay damages under Pa.R.C.P. 238 conflicts with federal law. Though state procedure generally applies in FELA cases brought in state courts, "so called" procedural rules which interfere with federal substantive law do not. *Brown v. Western Railroad of Alabama*, 338 U.S. 294 (1949). Damages, of course, are a matter of federal substantive law. The majority states that Rule 238 is nothing more than a procedural device used to encourage negotiation and settlement and lighten court dockets. This is pure sophistry. Any rule which increases a damage award by twenty-five percent has an undeniably material effect on damages. Application of our so-called procedural rule not only interferes with governing federal substantive law but undermines the national uniformity FELA was designed to achieve. *See Liepelt, supra* at 493 n. 5. Appellee's entitlement to delay damages or pre-judgment interest should be determined under federal substantive law not Pennsylvania procedure.

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[3] The United States Supreme Court does not clearly state in *Pfeifer* and *Dickerson* who should determine the method to be used to discount damages to present value. Since it is the jury's task to determine damages and discount them to present value, I believe that the jury should choose the method. Expert testimony on the various methods should be presented to aid the jury, and the judge should instruct the jury on all methods advanced by the parties.

Appendix A—Judgment and Opinion of the Supreme Court of Pennsylvania dated December 12, 1986.

In addition, for the reasons contained in my concurring opinion in *Craig v. Magee Memorial Rehabilitation Center*, _____ Pa. _____, _____ A.2d _____ (J-184-85, filed October 8, 1986), I do not believe that delay damages are under any circumstances a matter to be handled by a procedural rule.

Therefore, I would reverse Superior Court and remand for a new trial on damages.

Mr. Justice McDermott and Mr. Justice Zappala join in this Dissenting Opinion.

APPENDIX B

Order and Opinion of the Superior Court of Pennsylvania

SUPERIOR COURT OF PENNSYLVANIA
Pittsburgh District

No. 849 Pittsburgh, 1982

GERALD L. MORGAN

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation,

Appellant.

ORDER

AND NOW, this 8th day of March, 1985, it is ordered as follows:

_____	Order affirmed.
_____	Order reversed.
___X___	Judgment affirmed.
_____	Judgment of Sentence affirmed.
_____	Judgment of Sentence reversed.
_____	Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

Appendix B—Order and Opinion of the Superior Court of Pennsylvania dated March 8, 1985.

_____ Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

_____

DEPUTY PROTHONOTARY

Appendix B—Order and Opinion of the Superior Court of Pennsylvania dated March 8, 1985.

IN THE
SUPERIOR COURT OF PENNSYLVANIA

_____

No. 849 Pittsburgh, 1982

_____

GERALD L. MORGAN,

Appellee,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation,

Appellant.

_____

Appeal from the Judgment entered in the Court of Common Pleas, Civil Division, of Allegheny County, No. GD 70-23765.

BEFORE: ROWLEY, JOHNSON and HESTER, *JJ.*

OPINION OF THE COURT

Rowley, *J.*: Filed: March 8, 1985

This is an appeal from the Judgment entered on the jury's verdict in favor of Gerald L. Morgan, appellee, in the amount of $125,000.00 plus delay damages under Pa.R.C.P. 238, following the trial court's Order dismissing post-trial motions filed by Monessen Southwestern Railway Company (Monessen), appellant. This action was instituted by appellee under the Federal Employers' Liability Act, 45 U.S.C. §§51-60 (1976) (FELA), for injuries he suffered in the course of his

employment with Monessen. On appeal, appellant first argues that the trial court erred in adding $26,712.50 in delay damages pursuant to Pa.R.C.P. 238 in an action under the FELA. Appellant also contends that a new trial is warranted because the trial court erred in failing to instruct the jury that any damage award for future lost earnings must be reduced to present value.[1] For the following reasons, we affirm.

Appellant's initial contention is that the addition of delay damages under Pa.R.C.P. 238 was improper in an FELA case heard in a Pennsylvania court. This issue was resolved by a unanimous panel of our court in *Humphries v. Pittsburgh & Lake Erie Railroad Company*, _____ Pa.Super. _____, 476 A.2d 919 (1984). In *Humphries*, this court held that, "while the FELA does not fix the rate of prejudgment interest, the allowance of such interest pursuant to Rule 238 comports with our understanding of the federal decisional law on the matter." Id. at _____, 476 A.2d at 926. Our decision in *Humphries* is controlling in this case and, thus, the trial court's addition of delay damages to the jury's verdict was proper.

Appellant's next contention is that the trial court erred in failing to instruct the jury that an award for future lost earnings was to be calculated on the basis of net earnings after taxes in accordance with *Norfolk and Western Railway Company v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755 (1980). We have carefully reviewed the charge given by the trial court and we find that it was in keeping with the principles espoused in *Liepelt*; accordingly, we find no error in the charge regarding this issue which warrants the grant of a new trial.

Appellant's final contention is that a new trial is required because the trial court failed to charge the jury, as requested by appellant, that a damage award for future lost earnings must be reduced to its present value. The trial court charged the jury in accordance with the "total offset method" for determining future earning capacity, as set forth in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), which equates the rate of future inflation with that of future interest rates and eliminates the need for adjustment of a verdict based upon these factors. (See N.T., December 4, 1982, pp. 701-701). The trial court refused to give appellant's requested jury instruction regarding present worth reasoning that, under *Kaczkowski*, it is unnecessary to burden the jury with such instructions. The court also relied upon the decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 678 F.2d 453 (3d Cir. 1982) *vacated* 103 S.Ct. 2541 (1983), wherein the "total offset method" was approved by the Third Circuit for use in federal actions under the Longshoremen's and Harbor Workers' Compensation Act.

During the pendency of this appeal, the United States Supreme Court reversed the Third Circuit's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541 (1983). At oral argument in this case, the parties were instructed to file supplemental briefs addressing the recent decision of the Court in *Pfeifer*, and we have had the benefit of reviewing their briefs on this issue.

In *Pfeifer*, the United States Supreme Court held that it was error for the Third Circuit to adopt the total offset rule of *Kaczkowski* as a *mandatory* rule for use in the

federal courts; hence, the trial court's judgment utilizing that rule was set aside. Nonetheless, the Court declined to establish a set rule as the exclusive method in all federal trial for calculating an award for lost earnings in an inflationary economy. The Court observed:

> The litigants and the amici in this case urge us to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy. We are not persuaded, however, that such an approach is warranted. Accord, *Cookson v. Knowles, supra*, at 574 (Lord Salmon). For our review of the foregoing cases leads us to draw three conclusions. First, by its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a 'rough and ready' effort to put the plaintiff in the position he would have been in had he not been injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and unpredictability create a substantial risk that the damage award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others.

> These conclusions all counsel hesitation. Having surveyed the multitude of options available, we will do no more than is necessary to resolve the case before us. We limit our attention to suits under §5(b) of the Act, noting that Congress has provided generally for an award of damages but has not given specific guidance regarding how they are to be calculated. Within that narrow context, we shall define the general boundaries within which a particular award will be considered legally acceptable.

Id. at 2555. With respect to the offset method set forth in *Kaczkowski v. Bolubasz, supra*, the Court stated:

> Although such an approach has the virtue of simplicity and may even be economically precise, we cannot at this time agree with the Court of Appeals for the Third Circuit that its use is mandatory in the federal courts.
>
> • • • •
>
> As a result, the judgment below must be set aside. In performing its damages calculation, the trial court applied the theory of *Kaczkowski, supra*, as a mandatory federal rule of decision, even though the petitioner had insisted that if compensation was to be awarded, it 'must be reduced to its present worth.' J.A. 60. (footnotes omitted)

Id. at 2557. The Court in *Pfeifer* further directed:

> On remand, the decision on whether to reopen the record should be left to the sound discretion of the trial court. It bears mention that the present record

already gives reason to believe a fair award may be more confidently expected in this case than in many. The employment practices in the longshoring industry appear relatively stable and predictable. The parties seem to have had no difficulty in arriving at the period of respondent's future work expectency, or in predicting the character of the work that he would have been performing during that entire period if he had not been injured. Moreover, the record discloses that respondent's wages were determined by a collective bargaining agreement that explicitly provided for 'cost of living' increases, J.A. 310, and that recent company history also included a 'general' increase and a 'job class increment increase.' Although the trial court deemed the latter increases irrelevant during its first review because it felt legally compelled to assume they would offset any real interest rate, further study of them on remand will allow the court to determine whether that assumption should be made in this case.

IV

We do not suggest that the trial judge should embark on a search for 'delusive exactness.' It is perfectly obvious that the most detailed inquiry can at best produce an approximate result. And one cannot ignore the fact that in many instances the award for impaired earning capacity may be overshadowed by a highly impressionistic award for pain and suffering. But we are satisfied that whatever rate the District Court may choose to discount the estimated stream of future earnings, it

must make a deliberate choice, rather than assuming that it is bound by a rule of state law. (footnotes omitted)

Id. at 2558.

Thus, the Supreme Court in *Pfeifer* held that it is the trial court's task to determine the appropriate method to be utilized in discounting estimated future earnings under the circumstances of a particular case. However, the Court directed that the trial court in a federal case "must make a deliberate choice, rather than assuming that it is bound by a rule of state law." *Id.* Accordingly, the Court vacated the judgment of the Third Circuit Court of Appeals adopting the "total offset method" as a mandatory rule and remanded the case to allow the court to determine whether the "total offset" formula was the appropriate method to apply in arriving at a future lost earnings figure under the particular circumstances of that case.

Although *Pfeifer* involved a cause of action under §5 of the Longshoremen's and Harbor Workers' Compensation Act, we are persuaded that the reasoning in that case is applicable to FELA cases brought in state court since the FELA, like the Longshoremen's Act, provides generally for a damage award, but gives no specific guidance regarding how that award is to be calculated. *See* 45 U.S.C. §51; *Pfeifer*, 103 S.Ct. at 2555. The United States Supreme Court has previously determined that questions concerning the measure of damages in an FELA action are federal in character, and this is true even if the suit is instituted in state court. *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490, 100

S.Ct. 755 (1980). In *Liepelt*, the Appellate Court of Illinois held that the trial court had not erred in refusing to instruct the jury as to the non-taxibility of an award in an FELA case and in excluding evidence of the effect of income taxes on future earnings of the decedent. The Illinois Supreme Court denied leave to appeal and the United States Supreme Court granted certiorari. In reversing the decision of the Illinois appeals court, the Supreme Court held that the question whether it was error for the state court to refuse the instruction and to exclude evidence concerning federal taxes was "a matter governed by federal law." *Id.* at 492-93, 100 S.Ct. at 757. Thus, the Court observed that the practice being followed by a particular state—in that case, Illinois—was subject to change by a decision of the United States Supreme Court. This approach is consistent with Congress' intent to "create uniformity throughout the Union" with respect to railroads' financial responsibility for injuries to their employees under the FELA. *Id.* at 493 n.5, 100 S.Ct. at 755 n.5.

The dissenting opinion in *Liepelt*, authored by Justice Blackmun and joined by Justice Marshall, concluded that jury instructions regarding the taxability of a damages award were "cautionary in nature" and that whether such instructions should be given was a matter governed by state law when an FELA action is brought in state court. *Id.* at 503-504, 100 S.Ct. at 762-63. Justice Blackmun stated that questions of procedure and evidence in cases arising under the FELA should properly be determined according to the law of the forum. Nonetheless, this argument was not adopted by the majority in *Liepelt*, and we are therefore bound by

the Court's determination that questions concerning the measure of damages in an FELA action are governed by federal law.

Accordingly, we are compelled to analyze the case at bar in light of the principles announced by the United States Supreme Court in *Pfeifer, supra.* Nonetheless, we do not read *Pfeifer* as necessarily precluding use of the total offset method set forth in *Kaczkowski v. Bolubasz, supra*, or an approved variation thereof. Thus, we do not agree with the interpretation given *Pfeifer*, by the Third Circuit in their recent opinion in *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394 (3rd Cir. 1984).

The trial in *DiSabatino* occurred prior to the Supreme Court's decision in *Pfeifer.* In accordance with the total offset method, which had been approved by the Third Circuit, no evidence was presented on reduction of future lost earnings to present worth, and the jury was not instructed on that theory. It is not clear whether the jury was actually instructed regarding the total offset theory. Following the verdict, the Supreme Court's decision in *Pfeifer* was filed. On appeal, the court in *DiSabatino* held that a *new trial* on damages was mandated because the jury had not been instructed to reduce any award for future lost earnings to its present worth. Thus, *DiSabatino* appears to interpret the *Pfeifer* decision as disallowing use of the total offset method in an FELA case and requiring reduction of an award for future lost earnings by some percentage in order to arrive at present value.

We do not interpret the Supreme Court's decision in *Pfeifer* as precluding utilization of the total offset

method, if appropriate, in a case under the FELA. The Court described at least three "legally acceptable" techniques for arriving at an award for future lost income. *See Shaw v. United States*, 741 F.2d 1202, 1207 (9th Cir. 1984) (offset method referred to as one of three acceptable methods for determining appropriate discount rate in case under Federal Torts Claims Act). *See generally, Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983). The Court expressly refused to adopt any one method as the exclusive method to be employed in federal trials under the Longshoremen's Act or federal trials generally. Rather, the Court directed that the trial judge must make a conscious reasoned choice among the approved methods for arriving at a lost earnings figure, taking interest and inflation rates into account and considering the circumstances of the industry and the particular plaintiff involved. If the relevant factors in a particular case support an assumption that the inflation rate offsets any "real" interest rate, then application of the total offset theory would be appropriate and consistent with the reasoning in *Pfeifer*. 103 S.Ct. at 2558. We are convinced that if a trial judge chooses an approved method of computation and gives his reasons for doing so, the Supreme Court's direction in *Pfeifer* is satisfied.

In the instant case, the trial judge "spent considerable time" determining whether an instruction on present worth should be incorporated in her charge to the jury. (N.T., Vol. V, December 4, 1981, pp. 577-80). She concluded, however, that a present worth instruction was not required, in light of the rule set forth in *Kaczkowski v. Bolubasz, supra*. Although the *Pfeifer* decision requires trial judges to make a reasoned choice among the legally

acceptable methods for arriving at a lost earnings figure, the trial judge's decision in this case cannot be faulted since she did not have the benefit of reviewing that decision. Thus, rather than remanding this case for consideration of the principles announced in *Pfeifer*, we have undertaken a review of the record before us in order to ascertain whether the total offset method was an appropriate method to be utilized under the particular facts and circumstances of this case. On the basis of the record certified to us on appeal, we find that application of the total offset method was appropriate in this case and that its application did not result in prejudicial error. Although appellant submitted a requested instruction concerning reduction of a lost earnings award to present value, and now urges this court to reverse the judgment because the trial judge did not so charge the jury, appellant presented no evidence that would have supported such an instruction. If appellant wanted the trial court to instruct the jury regarding an alternative discount method, evidence relevant to that method should have been offered. *See O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842, 858 (1984); *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d at 396.

Accordingly, we find that the trial court's reliance on the total offset method for determining present worth of a future lost earnings award was not erroneous in light of the evidence submitted in this case. Judgment affirmed.

FOOTNOTE

[1] Appellant does not allege any error in the trial regarding the verdict on liability.

APPENDIX C

Orders of Court in the Court of Common Pleas of Allegheny County, Pennsylvania

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania
Civil Division

G.D. No. 79-23765

GERALD L. MORGAN,

Plaintiff,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation,

Defendant.

ORDER OF COURT

AND NOW, this 15th day of December, 1981, the court further molds the verdict of the jury entered in this action on December 4, 1981, by adding to the amount of the verdict the sum of $26,712.50 as damages for delay at 10% per annum for the period from October 15, 1979 through the date of the verdict. The total verdict in this action is $151,712.50.

BY THE COURT:

/s/ Finkelhor, *J.*

Eo Die exceptions noted to def.

/s/ Marion K. Finkelhor, *J.*

Appendix C—Orders and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania dated July 22, 1982.

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania
Civil Division

No. GD 79-23765

GERALD L. MORGAN,

Plaintiff,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation,

Defendant.

Before: Del Sole, *C.J.* and Finkelhor, *J.*

ORDER OF COURT

FINKELHOR, *J.*

AND NOW, to wit, this 22nd day of July, 1982, upon the motion of the defendant Monessen Southwestern Railway Company for judgment N.O.V. and/or a new trial based upon 1) the award of delay damages under Pa.R.C.P. Rule 238; 2) instructions on damages in accordance with *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980); and 3) the charge of the Court on the defendant's negligence; and after full consideration of the extensive briefs and arguments of counsel, the record

Appendix C—Orders and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania dated July 22, 1982.

and the charge of the Court, it is hereby ORDERED, ADJUDGED and DECREED that said post-trial motions are dismissed and judgment shall be entered in favor of the plaintiff in the amount of $125,000, plus delay damages under Rule 238, upon the payment of the verdict fee. The post-trial motions filed by the plaintiff are also denied.

BY THE COURT:

/s/ Finkelhor, *J.*

Eo Die exceptions noted to defendant and bill sealed.

/s/ Marion K. Finkelhor, *J.*

I CONCUR:

/s/ Del Sole, *Judge*

Appendix C—Orders and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania dated July 22, 1982.

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania
Civil Division

No. GD 79-23765

GERALD L. MORGAN,

Plaintiff,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation,

Defendant.

Before: Del Sole, *C.J.* and Finkelhor, *J.*

OPINION

FINKELHOR, *J.* July 22, 1982

The above matter, arising from the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C.A. §51, comes before the Court, en banc, on the motions of the defendant, Monessen Southwestern Railway Company, for judgment N.O.V. or for a new trial from a jury verdict in favor of the plaintiff, Gerald L. Morgan. Decision in this matter was delayed due to the late filing of the defendant's brief.

Appendix C—Orders and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania dated July 22, 1982.

The issues[1] raised in post-trial motions are as follows:

1. Pa.R.C.P. Rule 238, providing for pre-trial delay interest, is not applicable or proper in an F.E.L.A. case;

2. The "offset method" for the determination of damages for the impairment of earning capacity is not applicable to F.E.L.A. cases.

3. The charge of the Court as to the negligence of the defendant was in error.

In order to determine the validity of the defendant's motions, it is necessary to consider briefly the facts of record.

This action was filed by the plaintiff, Gerald L. Morgan (Morgan), an employee of the railroad on September 6, 1979, as a result of injuries sustained by the plaintiff on August 27, 1977. At the time of his injury, the plaintiff was a brakeman and conductor for the railway at the Wheeling-Pittsburgh Steel Corporation's Monessen plant. On the date of the accident, plaintiff was riding a train as part of a switching operation. As the railroad car approached a close clearance between the car, on which the plaintiff was riding, and a car on the adjacent track, plaintiff dismounted from the car onto a walkway on the southside of the No. 3 track. As his foot reached the walkway, the plaintiff lost his balance allegedly due to iron ore pellets in the space between the tracks. He twisted to avoid falling under the wheels of the moving train and fell against the side of the railroad car on the opposite track. The crew had no radios and

Appendix C—Orders and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania dated July 22, 1982.

plaintiff was unable to signal the engineer to avoid the close clearance and had no alternative but to dismount from the train. As a result of this incident, plaintiff has alleged permanent injuries to his back and neck.

It was plaintiff's position at the time of trial that the iron ore pellets were hazardous and that his injuries were the result of the Monessen's failure to provide him a reasonably safe place to work.

The iron ore pellets in question were delivered to the Monessen plant of the Wheeling-Pittsburgh Steel Corporation by the Pittsburgh & Lake Erie Railroad Company for use at the steel plant's blast furnaces. These pellets are round, hard and marble-like and it was testified to by the plaintiff and his fellow workers that the pellets were a hazard to persons working in the yard. It was the defendant's contention that the Monessen employed diverse and constantly improved methods to minimize the effect of all mineral spillage and that it was impossible to completely remove the various types of minerals which escaped from railroad cars.

After five days of trial, the jury returned a verdict in favor of the plaintiff in the amount of $125,000. Immediately after the jury verdict was recorded and the jury dismissed, counsel for the plaintiff requested delay damages under Rule 238 of the Pennsylvania Rules of Civil Procedure. (T. at 719) No objection was made by the defendant and the Court subsequently molded the verdict to $151,712.50.[2]

Argument on post-trial motions were delayed until the record was transcribed and futher delayed due to the

failure of the defendant to timely file his brief. Plaintiff filed a petition to dismiss the motions, which was subsequently denied, and the matter heard on the merits. There is also a question as to whether defendants exceptions on Rule 238 were timely made. *Dilliplaine v. Lehigh Valley Tr. Co.*, 457 Pa. 255, 322 A.2d 114 (1974).

DISCUSSION

The basic issue underlying the defendant's exceptions as to delay damages and the manner of calculating plaintiff's loss of earning capacity is the degree to which State law is applicable to F.E.L.A. cases. To state the obvious, while F.E.L.A. is a Federal Act, enacted by the national Congress, jurisdiction exists in both Federal and State courts. However, the United States Supreme Court has stated that one of the purposes of the F.E.L.A. Act was to create uniformity throughout the Union with respect to the financial responsibility of railroads for injuries to their employees. *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 Supreme Ct. 755 (1980). However, the rule concerning the application of State laws to F.E.L.A. cases is well established and may be stated as follows:

> "All laws concerning procedural matters are to be applied, whereas those concerning substantive matters are not." Annotations, 79 A.C.R.2d 553

This distinction should be distinguished from the "outcome determinative test" used in diversity cases under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 Supreme Ct. 817 (1938).

1) The application of Pennsylvania Rule 238

It is the contention of the defendant that prejudgment interest is a substantive matter and that Pennsylvania Rule 238, which awards delay interest, cannot be applied to F.E.L.A. verdicts in State courts. Defendant cites *Jarvis v. Raymond Johnson et al.*, 668 F.2d 740 (3d Cir. 1982) to the effect that under *Erie v. Tompkins, supra*, Rule 238 is outcome determinative and therefore applicable to diversity actions. Defendant is, in effect, equating the outcome derivative test to determine substantive law. In fact, they are not the same. Procedural Rules may affect the outcome of the proceeding but not be a matter of substantive law.

The rule-making power of the Pennsylvania Supreme Court is set forth in Article V, Section 10(c), of the Constitution which states as follows:

> "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all the courts . . ."

Under the exercise of its rule-making power, the Pennsylvania Supreme Court promulgated Rule 238 to permit a plaintiff to receive an award of 10% interest on the verdict as compensation for delay, provided that the verdict exceeds 125% of the last written offer of settlement made by the defendant.

In *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147 (Pa. 1981), where the procedural-substantive issue was raised, the Supreme Court found Rule 238 to be procedural in nature and stated the background for the Rule as follows:

> "The Civil Procedural Rules Committee conducted a study of major cases in the Pennsylvania judicial system which were not subject to arbitration. Statistics revealed that only 38% go to trial; only 25% culminate in a verdict. Most cases which do settle prior to trial only do so very close to the scheduled trial date. The delay in disposition of cases emasculates the judicial system's ability to hear those cases which must be litigated. Rule 238 fulfills this Court's obligation to the legislature and to the public to effectuate prompt, expeditious trial and settlement of cases. 436 A.2d at 152

The intent of the Supreme Court was not to establish new precedents for the calculation of damages but to regulate the orderly flow of cases through the judicial system. Further, a Pennsylvania trial court is bound by the rulings of Pennsylvania appellate courts.

While provision for delay interest was promulgated by Rules of court, the Pennsylvania Judicial Code and its predecessors have provided for post-judgment interest. 42 Pa.C.S.A. 8101. Similar post-judgment provisions have been enforced in F.E.L.A. cases. *Louisville & N.R. Co. v. Stewart*, 241 U.S. 261 (1916).

In *Louisiana & Arkansas R.R. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944), the court stated:

> "State and federal courts exercise concurrent jurisdiction over causes arising under the Federal Employers' Liability Act; interest is essentially a question of local law; and for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied wherever it is practicable to do so . . . " 142 F.2d at 850

To accept the defendant's argument would, in effect, mean that the State would lack the power to deal with existing court backlogs or problems of judicial administration in their own courts. It is, to state the obvious, that recalcitrant defendants in F.E.L.A. cases can produce delay and backlogs in the same manner as any other defendant.

Based upon the above discussion, it is our conclusion that the defendant's argument as to Rule 238 is without merit.[5]

2) Present Worth in the determination of damages for loss of earning capacity.

The defendant contends that it was error for the Court to instruct the jury in accordance with the "offset method" for the determination of the plaintiff's earning capacity as set forth by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). It is the defendant's argument that the elements of damages in an F.E.L.A. proceeding are covered by Federal law, with which we agree. However, it is defendant's further position that certain "magic" words such as, present worth, inflation and others must be specifically given to the jury, including instructions to reduce future damages for loss of earning capacity to present worth.

The offset method of *Kaczkowski* recognized that the long complicated charges given to the jury to calculate interest rates and inflationary factors was counter-productive and, in effect, unfair to both parties. Absent a

computer, the traditional present worth-inflationary factor approach resulted in pure speculation. The decision in *Kaczkowski* took into consideration all of the factors listed by the defendant and reached the determination that these factors offset each other. We find no violation of Federal substantive law but rather a recognition that, when all of these factors are considered, there is a cancelling out of the inflationary spiral and interest derived from damage payments and it is not necessary to belabor the jury.

Further, in the recent Third Circuit decision in *Pfeifer v. Jones & Laughlin Steel Corp.*, No. 81-1928 (Opinion filed April 16, 1982), the court found that a charge under the Longshoreman's and Harbor Workers Compensation Act, in which the District Court applied the total offset method, was not in error.

As stated by the Circuit Court on page 14-15 of the Slip Opinion:

> "What had troubled the courts for years was the speculative nature of prodicting future inflationary trends. The Pennsylvania Court has not only recognized this problem but met it head on by adopting what is known as the 'total offset method,' a variation of methods introduced by the federal district court in Feldman v. Allegheny Airlines, Inc., 382 F.Supp. 1271 (D. Conn. 1974) ... The total offset method avoids the danger of speculating as to the future rate of inflation by making what we consider a very sensible accomodation: it assumes that in the long run the effects of future inflation

> and the discount rate will co-vary significantly with the other. See authorities cited in Kaczkowski, 491 Pa. at 581, 421 A.2d at 1037. Moreover, we are impressed by the pragmatic considerations embraced by the Pennsylvania court:
>
> > "An additional virtue of the total offset method is its contribution to judicial efficiency. Litigators are freed from introducing and verifying complex economic data. Judge and juries are not burdened with complicated, time consuming economic testimony. Finally, by eliminating the variables of inflation and future interest rates from the damage calculation, the ultimate award is more predictable. Id. at 583, 421 A.2d at 1038."

Based upon the decision in *Pfeifer*, we can find no merit in the defendant's exception to the Court's charge on damages for loss of earning capacity.

An auxiliary exception of the defendant was to the instruction on income taxes given by the Court.

At page 702 of the record, the Court instructed as follows:

> "As stated in a recent Federal case, your award will not be subject to any income taxes and you should not consider such taxes in fixing the amount of the award as to damages to be received for future loss of earning capacity."

This charge met the test of *Norfolk & Western Railway Co. v. Liepelt, surpa*, and no further discussion is required.

3) The negligence of the Defendant.

It is a well established principle in Pennsylvania law that the charge of the Court must be taken as a whole.

At page 680 of the transcript, the Court stated as follows:

> "A railroad is not an absolute insurer of the safety of its employees, and it is not liable if it was not at fault. However, the railroad has a continuing duty to exercise care in seeing to it that its facilities are reasonably fit for their intended use and is required to foresee that injuries might occur from a hazardous situation. The railroad is not bound to foresee the particular and exact manner in which an employee might be injured, but it has the duty to foresee that an accident might occur in some manner if conditions of hazard are present. The question, therefore, is whether the railroad exercised due care with respect to the situation as it existed at the time and place of this alleged injury."[1]

We find nothing within the charge that would support the defendant's position that the Court negated Monessen's entire defense by finding that the dangerous condition existed.

Based upon the above discussion and after full consideration of the briefs filed by both counsel, defendant's motion for judgment N.O.V. or a new trial is denied and an appropriate Order is attached hereto. Plaintiff's motion to dismiss defendant's motions is also denied.

FOOTNOTES

[1] All of these issues go to the motion for a new trial. Defendant has not set forth any argument on the motion for a judgment N.O.V.

[2] "MR. HOLLANDER: As indicated in open Court, Your Honor, I move to mold the verdict to add damages pursuant to Rule 238 at the rate of ten percent annum. The effective date of it, let's see, this suit was filed—I guess the effective date would be October 30, 1979. I can double check that.

"THE COURT: Do you want the rules?

"MR. HOLLANDER: I should add: For the reason no written offer within 125 percent—no. No written offer has been made that would prevent the application of the rule.

"THE COURT: Is that correct?

"MR. REIF: I believe that is, Your Honor, to my knowledge. I think the only offer that has been made was in the vicinity of $60,000. I am not sure.

"MR. HOLLANDER: There was a written offer of $65,000.

"MR. REIF: $60,000 to $65,000.

"MR. HOLLANDER: $65,000.

"THE COURT: So this would come—do you want me to do the arithmetic on it?

"MR. HOLLANDER: I will be glad to do it. It should be a part of the verdict to record the judgment.

Appendix C—Orders and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania dated July 22, 1982. •

"THE COURT: All right. Well, we have to get a—

"MR. HOLLANDER: I will get the date.

"THE COURT: It will be molded by the Court under Rule 238. That is for ten percent delayed damages; and, then, you bring me in an amended verdict petition to—I mean, I think you want to get it right.

"MR. HOLLANDER: I do and—

"MR. REIF: I would like to have a chance to do that, myself. Tom, I am not—I would like to have a chance to make that calculation."

[1] To our knowledge, 5 Judges of this Court have, in separate cases, awarded Rule 238 interest.

[2] The charge is replete with similar statements. See T. 691-705.

APPENDIX D

Notice of Appeal of the Supreme Court of Pennsylvania, Western District

SUPREME COURT OF PENNSYLVANIA
Western District

No. 63 W. D. Appeal Docket 1985

Appeal from the March 8, 1985 Order of the Superior Court at No. 849 Pittsburgh, 1982, Affirming the Order Dated July 22, 1982, and Judgment Entered July 27, 1982, of the Court of Common Pleas, Civil Division, of Allegheny County at GD 79-23765.

399 Pa. Super. 465, 489 A.2d 254 (1985)

ARGUED: September 15, 1986

GERALD L. MORGAN,

Appellee,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation,

Appellant.

NOTICE OF APPEAL

Appendix D—Notice of Appeal to this Court dated February 27, 1987.

The Monessen Southwestern Railway Company hereby appeals to the Supreme Court of the United States from the Judgment of the Supreme Court of Pennsylvania (Western District) entered on December 12, 1986 in the above-captioned action. This appeal is taken pursuant to 28 U.S.C. §2101.

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Dated: February 27, 1987

APPENDIX E

Rule and Statutory Provisions

PENNSYLVANIA RULE OF CIVIL PROCEDURE 238.

Rule 238. Award of Damages for Delay in an Action for Bodily Injury, Death or Property Damage

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1836, P.L. 715, as amended, 5 P.S. §30 et seq., or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. §1301.101 et seq., shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

(b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determining whether the amount in controversy is within the jurisdiction of the arbitrators.

(c) Except as provided in subdivision (e), damages for delay shall be added to the award, verdict or decision against all defendants found liable, no matter when joined in the action.

Appendix E—Verbatim Copies of Pa.R.Civ.P. No. 238, 28 U.S.C. §1961 and 45 U.S.C. §56.

(d) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not award the plaintiff any damages for delay because this is a matter for the court.

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

(f) If an action is pending on the effective date of this rule, or if an action is brought after the effective date on a cause of action which accrued prior to the effective date, damages for delay shall be computed from the date plaintiff files the initial complaint or from a date one year after the accrual of the cause of action, or from a date six (6) months after the effective date of this rule, whichever date is later.

(g) This rule shall not apply to

(1) eminent domain proceedings.

(2) pending actions in which damages for delay are allowable in the absence of this rule.

Appendix E—Verbatim Copies of Pa.R.Civ.P. No. 238, 28 U.S.C. §1961 and 45 U.S.C. §56.

28 U.S.C. §1961

§1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the

rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title III, §302(a), 96 Stat. 55; Sept. 13, 1982, Pub.L. 97-258, §2(m)(1), 96 Stat. 1062; Jan. 12, 1983, Pub.L. 97-452, §2(d)(1), 96 Stat. 2478.)

FEDERAL EMPLOYER'S LIABILITY ACT

45 U.S.C. §56. Actions; limitations concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant or in which the cause of action acose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

MOTION

No. 86-1743

Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

MOTION OF APPELLEE GERALD L. MORGAN TO DISMISS OR AFFIRM

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Questions Presented

1. Whether this Court should review the applicability to an action under the FELA of a state rule of civil procedure designed to assess, under certain circumstances, pre-verdict interest for delay in all personal injury cases in the state, when the rule is not clearly inconsistent with federal law and where the mandatory provisions of the rule have been suspended by the state supreme court pending a change of the rule?

2. Whether the state courts in this case could and did properly apply the "total offset" rule to reducing an award for impairment of earning capacity to present value?

3. Whether this Court's policies make review of this appeal inappropriate where the state rule in question is partially suspended and subject to revision, where the judgment in question has been substantially paid pursuant to the provisions of a supersedeas appeal bond and where the appellant is in bankruptcy?

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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-1743

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

MOTION OF APPELLEE GERALD L. MORGAN TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Statement

This action was brought pursuant to the Federal Employers' Liability Act (FELA), *as amended*, 45 U.S.C. §51, *et seq.*, in the Court of Common Pleas of Allegheny County for damages resulting from permanent injury to Mr. Morgan's back which he suffered on August 27, 1977, in the course of his employment as a railroad trainman with the appellant, Monessen Southwestern Railway Company (hereinafter referred to as "MSW"). At the time of his injury, Mr. Morgan was 46 years old.

Prior to the trial of the case, Mr. Morgan returned to work as a turn foreman for MSW at a rate of pay equivalent to what he would have earned as a trainman. He also continued to share in employee incentive programs and his pension rights remained unchanged. At trial, counsel for MSW argued that Mr. Morgan's future losses would be insignificant because he would continue to work in the future as a turn foreman, receiving the same compensation as a trainman.

The trial court instructed the jury on the "total offset" method for reduction to present worth of damages for impairment of earning capacity. On December 4, 1981, the jury returned its verdict in favor of Mr. Morgan in the amount of $125,000.00. By Order of Court dated December 15, 1981, the trial court molded the verdict pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure, adding to the amount of the verdict the sum of $26,712.50 as pre-judgment interest, for a total verdict of $152,712.50. (Appendix C of MSW's Jurisdictional Statement, p. 36a).

MSW filed post-trial motions, contending that the assessment of pre-trial interest was not proper in an FELA case and that the total offset method for

determining damages for the impairment of future earning capacity is not applicable to FELA cases. In its opinion dated July 22, 1982, the trial court rejected MSW's arguments. (Appendix C of MSW's Jurisdictional Statement, pp. 39a-50a). While noting that substantive matters in an FELA case are to be decided pursuant to federal law, the court determined that Rule 238 was a state procedural rule, promulgated by the Supreme Court of Pennsylvania to create an impetus for early, meaningful settlement negotiations in order to reduce delays and congestion in the Pennsylvania courts. In support of its decision, the trial court cited *Laudenberger v. Port Authority of Allegheny County*, 436 Pa. 52, 463 A.2d 147 (1981), *appeal dismissed, sub nom., Bucheit v. Laudenberger*, 456 U.S. 940 (1982), in which the Supreme Court of Pennsylvania held that its promulgation of Rule 238 was a valid exercise of its authority to make rules governing practice and procedure in Pennsylvania state courts.

Recognizing that the elements of damages in an FELA action are governed by federal law, the trial court held that the "total offset" method of reducing damages for impairment of earning capacity to present worth as set forth in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), was proper. The court said that "the traditional present worth-inflationary factor approach resulted in pure speculation." (Appendix C, p. 46a). Accepting the rationale for the offset method as explained by the Supreme Court of Pennsylvania in *Kaczkowski*, the trial court found that its use was proper in an FELA case because "when all of these factors are considered, there is a cancelling out of the inflationary spiral and interest derived from damage payments and it is not necessary to belabor the jury." (Appendix C, p. 46a).

On appeal, the Superior Court of Pennsylvania affirmed the trial court's decision, in an Order and Opinion dated March 8, 1985. (Appendix B of MSW's Jurisdictional Statement, pp. 23a-35a). In holding that the trial court's addition of pre-verdict interest in an FELA case was proper, the Superior Court found that its decision in *Humphries v. Pittsburgh & Lake Erie Railroad Company*, 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert. denied*, _____ U.S. _____, 106 S. Ct. 179 (1985) was controlling. In *Humphries*, the court had held that an award of Rule 238 pre-verdict interest in an FELA case brought in state court was not inconsistent with federal law.

Realizing the trial court did not have the opinion of this Court in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) disapproving the mandatory use of any particular method for reduction to present worth, the Superior Court, analyzing this case in light of this Court's *Pfeifer* decision, determined that the trial court's application of the offset method was appropriate. In doing so, the Superior Court concluded that this Court permitted the use of the total offset method following a conscious reasoned choice among approved methods. In addition, the Superior Court noted that MSW failed to present evidence that would have supported any other method to be used for reduction to present worth.

The Supreme Court of Pennsylvania affirmed the decision of the Superior Court in a Judgment and Opinion dated December 12, 1986. (Appendix A of MSW's Jurisdictional Statement, pp. 1a-22a). The Supreme Court concluded that the trial court's application of the offset rule in an FELA case satisfied "the requirements of federal law as enunciated in *Pfeifer*." (Appendix A, p. 10a). The Supreme Court also

determined, on the basis of the Superior Court's decision in *Humphries, supra*, that Rule 238 pre-verdict interest, as applied to an FELA case, did not contravene federal law. In so holding, the court noted that the goal of Rule 238 was to promote "meaningful negotiations in major cases so as to unclutter the courts." (Appendix C, p. 16a, quoting *Laudenberger, supra*). The Court went on to say that

> [t]his worthy goal in no manner conflicts with the purpose of the FELA, nor do the prejudgment interest provisions of Rule 238 contravene any provision of the federal act. This Court has the right to institute procedural rules designed to alleviate congestion in the trial courts. Cases brought under the FELA, as well as other federal statutes, contribute to such congestion the same as cases instituted under state laws. A rule of procedure, such as Rule 238, which does not conflict with any provision of the FELA is properly applied to FELA cases brought in Pennsylvania courts.

(Appendix C, pp. 16a-17a, footnotes omitted).

On March 29, 1985, MSW posted a supersedeas bond in the amount of $182,055.00 or 120% of the total verdict, conditioned on the determination of MSW's appeal to the Pennsylvania Supreme Court. Since April 16, 1985, shortly after the posting the supersedeas bond, MSW has been in bankruptcy proceedings in the United States Bankruptcy Court for the Western District of Pennsylvania at Docket No. 85-0779 Pgh. Following the affirmance of the judgment by the Supreme Court of Pennsylvania, the bonding company paid Mr. Morgan the amount of the bond. Mr. Morgan retains his right against MSW for the amount of the deficiency from post-verdict interest which, as of the time of the payment of the bond, amounted to approximately $16,000.00.

ARGUMENT

I. The appeal of MSW should be dismissed because it does not present a substantial federal question.

A. Rule 238, as a rule of state procedure, may properly be applied to actions brought in state court under the FELA, without contravening federal law.

MSW justifies its appeal to this Court on the ground that the application of Rule 238 to a case brought under the FELA is repugnant to federal law. This Court, however, has stated that it "can be asked to condemn a state statute as in conflict with national legislation only if the conflict is clearly shown." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 467 (1945). Moreover,

> [i]t . . . should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'

Missouri, Kansas & Texas Railway Company v. Harris, 234 U.S. 412 (1913), *quoting Reid v. Colorado*, 187 U.S. 137 (1902). Mr. Morgan contends that MSW cannot show Rule 238 to be clearly inconsistent with federal law.

Rule 238 was promulgated by the Supreme Court of Pennsylvania pursuant to its authority under the Pennsylvania Constitution to make rules governing practice and procedure in Pennsylvania state courts. In *Laudenberger, supra*, the court recognized that it is

"limited by the language of the [Pennsylvania] Constitution to promulgating only those rules which do not interfere with the substantive rights of litigants." *Id.*, 436 A.2d at 153-154. In this context, the court noted that "the purpose and effect [of the rule] are procedural, yet its performance will touch upon substantive rights of both parties." *Id.*, 436 A.2d at 155. Despite what it considered to be a collateral effect on substantive rights, however, the court upheld Rule 238 as a valid exercise of its procedural rule-making function since, "when viewed from the perspective of its purpose and goal, [the rule] contributes to the orderly and efficient administration of justice in Pennsylvania . . .," *id.*, by encouraging settlement and alleviating congestion in state court dockets.

It is the policy of this Court to accord "respectful consideration and great weight to the views of the state's highest court on matters of state law." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980). Moreover, the Pennsylvania determination in *Laudenberger* that Rule 238 was procedural was appealed to this Court which dismissed the appeal for want of a substantial federal question, *sub nom. Bucheit v. Laudenberger*, 456 U.S. 940 (1982). This is especially significant since such a dismissal by this Court is a decision on the merits of the case. *See Hicks v. Miranda*, 422 U.S. 332 (1975). Accordingly, the conclusion in *Laudenberger* that Rule 238 is a validly promulgated rule of state procedure is entitled to great, if not controlling, weight.

In its decision in this case, the Supreme Court of Pennsylvania relied on *Laudenberger* in concluding that Rule 238 is a procedural rule which does not conflict with any provision of the FELA and that the purpose behind

Rule 238 of alleviating court congestion applies with equal force to FELA cases, since they "contribute to such congestion the same as cases instituted under state laws." (Appendix A, pp. 16a-17a). The Supreme Court's decision in this matter is in accordance with *Humphries, supra*, in which the Superior Court of Pennsylvania held specifically that Rule 238 pre-judgment interest is applicable in FELA cases. This Court denied certiorari in *Humphries*, _____ U.S. _____, 106 S. Ct. 179 (1985).

As noted by the court in *Humphries*, the FELA contains no provision prohibiting pre-judgment interest. Title 28 U.S.C. §1961, which provides for post-judgment interest at various state rates on verdicts obtained in federal courts, does not preclude an award of pre-judgment interest. *Id.*, 476 A.2d at 923. Pre-judgment interest is not in conflict with federal law. The federal rule is that the award of pre-judgment interest in the absence of a statutory directive is in the sound discretion of the district courts. *Blau v. Lehman*, 368 U.S. 403, 414 (1962); *Lodges 743 and 1746, etc. v. United Aircraft*, 534 F.2d 422 (2d Cir. 1975); *Payne v. Panama Canal Co.*, 607 F.2d 155 (5th Cir. 1979). Federal courts have exercised discretion to impose pre-judgment interest in personal injury and wrongful death litigation, in admiralty cases, Jones Act claims, suits arising under the Death on the High Seas Act, Labor Management Relations Act disputes, Longshoremen's and Harbor Workers' Compensation Act suits, negligence claims and others, whether the damages are liquidated or unliquidated. *Payne v. Panama Canal Co., supra; Lodges 743 and 1746, etc. v. United Aircraft, supra; Howell v. Marmpegaso Compania Naviera, S.A.*, 578 F.2d 86 (5th Cir. 1978); *First National Bank of Chicago v. Material Services Corp.*, 597 F.2d 1110 (7th Cir. 1979); *Solomon v. Warren*,

540 F.2d 777, 794 (5th Cir. 1976), *reh. den.*, 545 F.2d 1298 (1977); *Monaghan v. Uiterwyk Lines, Ltd.*, 607 F. Supp. 1020 (E.D. Pa. 1985).

Because it could find no obvious conflict with federal law, and after an extensive review of the federal cases touching upon the subject, the *Humphries* court concluded that, where state law so provides, pre-judgment interest may be awarded in an FELA case without violating federal law. This view conforms to cases of this Court which indicate that, as Congress provided for concurrent jurisdiction in both federal and state courts over FELA cases, "[i]t contemplated suits in state courts and accepted state procedure in advance," even if the procedure imposed liability for an additional sum. *Dickinson v. Stiles*, 246 U.S. 631 (1918); *see also, Louisville & Nashville Railroad Company v. Stewart*, 241 U.S. 261 (1916) (addition of ten percent damages in order to obtain a supersedeas, as required under state law, was held to be permissible).

Finally, MSW's contention that the awarding of Rule 238 pre-judgment interest in FELA cases will undermine the uniformity of the FELA's application in state and federal courts, and, thus, promote forum shopping, is itself undermined by the fact that the mandatory provisions of Rule 238 were suspended by the Supreme Court of Pennsylvania in *Craig v. Magee Memorial Rehabilitation Center*, _____ Pa. _____, 515 A.2d 1350 (1986). Since the *Craig* decision, plaintiffs are no longer awarded pre-judgment interest automatically if the verdict is at least 25% greater than the defendant's settlement offer. Rather, a motion for such interest must be presented to the trial court, which is then to consider a number of factors, including the causes of unreasonable delay, in determining whether an award of interest is

appropriate. Accordingly, the current law of Pennsylvania is such that an award of pre-judgment interest cannot be reasonably predicted.*

B. The trial court's application of the "total offset" rule as a method of reducing an award for impairment of earning capacity to present worth was in accordance with this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

MSW contends that the trial court's application, in an FELA case, of the total offset rule as a method for determining the present worth of damages for impairment of earning capacity, violated this Court's pronouncements in *Pfeifer, supra*. The opinions of both the Superior and Supreme Courts of Pennsylvania in this case, however, indicate that the courts of Pennsylvania properly understand that this Court, in *Pfeifer*,

> . . . [held that] the total offset method adopted for use in Pennsylvania negligence cases is not a *mandatory* rule in federal trials; declined to adopt the total offset rule, or any rule, as the *mandatory* method for determining future damages in federal court cases; ruled that use of the total offset rule is not prohibited if the trial court finds it to be the appropriate method under the circumstances; and held that the trial court must make a deliberate choice, rather than assuming that it is bound by a rule of state law.

(Supreme Court opinion, Appendix A of MSW's Jurisdictional Statement, p. 8a) (Citation omitted).

In the instant case, the trial court "spent considerable time determining whether an instruction on present worth should be incorporated in her charge to the jury"

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* Even under the mandatory provisions of Rule 238, a litigant was not assured of delay damages, since the defendant, by a reasonable settlement offer, could thwart application of the rule.

(Superior Court opinion, Appendix B, p. 34a) and, nothing that the traditional present worth-inflationary factor approach resulted in pure speculation, it agreed with the decision of the Supreme Court of Pennsylvania in *Kaczkowski* that the total offset method should be chosen as a means of reducing future damages to their present value. The Superior Court, aware that the trial court did not have the benefit of this Court's decision in *Pfeifer*, reviewed the trial court's actions in light of the *Pfeifer* requirement and concluded that the trial court had selected the appropr ate method and that MSW was not entitled to a jury instruction on an alternative method of reducing future damages to present worth, because it had failed to offer evidence that would justify the use of any other method. The Supreme Court of Pennsylvania affirmed the Superior Court's decision that the total offset method is an appropriate means of reducing an award to present worth, since it was the method deliberately adopted by that court "as the rule that most nearly provides an injured claimant with damages to the full extent of the injuries sustained." (Appendix A, p. 9a).

Assuming *arguendo* that the trial court erred in the application of the total offset method because a reasoned choice was not made, this Court has stated that "if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 1093 (1985). Accordingly, this Court has held that it does not "review federal issues that can have no effect on the state court's judgment." *International Longshoremen's Association, AFL-CIO v. Davis*, _____ U.S. _____, 106 S. Ct. 1904, 1910 (1986). Because the Pennsylvania

appellate courts were aware of this Court's *Pfeifer* holding when they reviewed this case and found use of the total offset method consistent with *Pfeifer*, the same judgment is likely to be rendered if the case is remanded. Therefore, this Court should refrain from granting plenary review of this issue.

This is especially true since Mr. Morgan returned to work for MSW at a higher rate of pay than he received at the time of his injuries and with the same benefits package to which he was previously entitled. Accordingly, as contended by MSW at trial, Mr. Morgan's future damages are *de minimis* and, any change in the method of reduction of such damages to present worth would have a negligible effect on the verdict. In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 U.S. 755, 62 L.Ed. 2d 689 (1980), this Court said that the requirement to reduce damages in an FELA case by evidence of income taxes can be overlooked where its effect would be *de minimis*.

Finally, MSW has not shown that the use of the total offset method is inappropriate in Mr. Morgan's case.

II. The particular facts and circumstances of this case serve to make review of this appeal by this Court inappropriate.

Under this Court's policies, the particular circumstances of the case at bar, while not necessarily rendering the case moot, make this Court's review of this appeal inappropriate. First, since the trial of this case, the Supreme Court of Pennsylvania has suspended the mandatory provisions of Rule 238 and has instituted a radically different, temporary post-trial procedure for determining the propriety, on a case-by-case basis, of

assessing pre-judgment interest. *Craig, supra.* This temporary procedure is to remain in effect only until the rule is changed. *Id.* Therefore, the issue of the validity of old Rule 238 is arguably moot, for this case has "lost its character as a present, live controversy of the kind that must exist if [this Court is] to avoid advisory opinions on abstract questions of law." *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982), *quoting, Hall v. Beals*, 396 U.S. 45, 48 (1969).

In addition, review of this case is inappropriate since Mr. Morgan has been paid the amount of the supersedeas bond posted by MSW to stay execution of the judgment pending its appeal to the Pennsylvania Supreme Court. Although a deficiency remains for which Mr. Morgan has a right of recovery, MSW is presently in bankruptcy and it is speculative whether it will ever actually pay the deficiency to Mr. Morgan.

Although the case may not be rendered moot because Rule 238 has been modified, Mr. Morgan had been paid and the MSW is in bankruptcy, it is the policy of this Court "dictated by [its] very institutional nature and constitutional obligations, that [it] exercise [its] powers of judicial review only as a matter of necessity." *Sanks v. Georgia*, 401 U.S. 144, 151 (1971). Accordingly, "given the debilitated state of this lawsuit" and the policies of this Court, plenary review over this appeal, is inappropriate "in a legal context where we would not know whether that problem will ever arise." *Id.* at 151.

Conclusion

In view of the foregoing, appellee respectfully requests that this Honorable Court dismiss the appeal or affirm the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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REPLY BRIEF

No. 86-1743

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IN THE

Supreme Court of the United States

October Term, 1986

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Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant, the Monessen Southwestern Railway Company (the "MSW"), submits the within Brief in Opposition to the Motion of Appellee to Dismiss or Affirm in accordance with Supreme Court Rule 16.5.

ARGUMENT

Appellee's motion fails to demonstrate any grounds for dismissal or affirmance and in fact acknowledges the substance and importance of the issues presented by this appeal.

A. Whether State Court Rules Allowing Prejudgment Interest May Be Validly Applied In FELA Actions Presents A Substantial And Important Question Of First Impression To This Court.

In a tacit but significant admission that the propriety of applying state prejudgment interest rules to Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.* ("FELA") cases presents a substantial and important question, appellee devotes most of his motion to dismiss or affirm to his arguments on the merits of the issue. These arguments are unavailing, but in adopting this approach, appellee does not challenge the core reasons this appeal presents a substantial federal question for plenary review by this Court.

Thus, appellee does not deny that the Pennsylvania courts in this case sustained the validity of a state prejudgment interest rule as applied to an FELA action in the face of a contention that such an application is repugnant to federal law. Appellee further neither denies nor distinguishes the nearly unbroken line of federal and state court precedent disallowing prejudgment interest in FELA actions.[1] Nor can appellee escape the fact that thirty-two states now allow some form of prejudgment interest and the resulting certainty that the issue raised here will recur frequently. (*See* Jurisdictional Statement at 13-14). Finally, appellee does not dispute that this issue is one of national significance and important to railroads and railroad workers. By his silence, appellee necessarily admits that this is an appeal from a decision that departs from precedent; presents an issue of first

[1] *See* cases collected in *amicus curiae* Brief of the Association of American Railroads at 7, n.10.

impression; and will have a substantial effect on the adjudication of FELA actions nationwide.[2]

Appellee's concentration on the merits is a recognition not only of the propriety of this appeal but also of the weakness of his position. First, appellee begins by attempting to convert the issue of Rule 238's repugnancy to the FELA into whether the FELA in general preempts state law. It is abundantly clear, however, that it does, especially with respect to damages, and nowhere in his motion does appellee deny that prejudgment interest is an element of damages. As this Court has stated, "it has long been settled that questions concerning the measure of damages in an FELA action are federal in character ...." *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 (1980).[3]

[2] Appellee also agrees that the payment made by MSW's bonding company on the supersedeas bond does not moot this appeal and states that appellee continues to make further demand of MSW for approximately $16,000.00. (*See* Appellee's Motion at 5, 13). As noted in the Jurisdictional Statement (9, n.7), MSW has demanded return of the partial payment made by the bonding company. In light of appellee's continuing demand, MSW's demand for return of the sums paid, and MSW's claim against its bonding company, the partial payment to appellee not only does not moot this controversy, but does nothing to diminish its vitality.

[3] In this regard, appellee quotes extensively but not completely from *Missouri, Kansas & Texas Ry. Co. v. Harris*, 234 U.S. 412 (1914), where in addition to the remarks repeated in appellee's motion, this Court also stated:

> "When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

As discussed in the Jurisdictional Statement, the purpose and scheme of the FELA—including its goal of uniformity—cannot be accomplished and is clearly frustrated by the application of state prejudgment interest rules.

Second, appellee incorrectly focuses on the character and purposes of the state rule in a failed effort to show an absence of conflict between Rule 238 and the FELA. Preemption turns, however, not on the character, purposes or judicial interpretations of state law, but on the intent and purpose of Congress in enacting the federal legislation and whether the state law interferes with that intent. *See Shaw v. Delta Airlines*, 463 U.S. 85, 95 (1983). Appellee's approach—which is predicated on the rationale of the state courts in this case—in fact exposes the fundamental error underlying the decision of the Pennsylvania Supreme Court: that neither legitimate purposes nor procedural characterizations of a state law validate a conflict with preemptive federal law. *See Perez v. Campbell*, 402 U.S. 642, 650-653 (1971) [federal preemption issues determined by looking at effects not purposes of state law].

For this same reason, appellee misplaces reliance on *Laudenberger v. Port Authority of Allegheny County*, 436 Pa. 52, 463 A.2d 147 (1981), *appeal dismissed, sub nom., Bucheit v. Laudenberger*, 456 U.S. 940 (1982). Whatever weight may be properly accorded the decisions of a state's highest court on matters of state law in other contexts, they cannot control determinations of the congressional intent of federal law or excuse conflicts with that intent.[4] *Laudenberger*, which did not address

[4] The point is not that state court decisions on the rule are to be disregarded, but that the nature of the state rule as a matter of state law is not determinative of the preemption issue. *See, e.g., Norfolk v. Liepelt*, 444 U.S. at 495 (Blackmum, J., dissenting) ("I agree, of course, that state rules that interfere with federal policy are to be rejected even if they might be characterized as 'procedural' "). In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the case cited by appellee, the issue was not preemption. Instead, this Court considered the degree of state latitude under the Twenty-first Amendment, under which there exist shared federal/state authority and it is "recognized that each State holds great powers. . . ." *Id.* at 107. Moreover, the views of the state court accepted in that case included the view that "the asserted state interests are less substantial than the national policy" in question. *Id.* at 113.

whether Rule 238 conflicted with any federal statute, in fact acknowledged that the Rule had "substantive elements." *See* 436 A.2d at 155. More importantly, *Laudenberger's* consideration of whether Rule 238 was substantive or procedural in nature was required by state constitutional limitations on the Court's rule-making authority, *see* 436 A.2d at 149-155, not by any examination of the relationship between state and federal law. By contrast, appellee asserts no challenge to the conclusion of *Jarvis v. Johnson*, 668 F.2d 740 (3d Cir. 1982), reached in a far more relevant context, that Rule 238 is substantive and must be applied in diversity cases adjudicated in federal court.

This Court's dismissal of this appeal in *Laudenberger*, moreover, is of no consequence to the present appeal.[5] Contrary to the impression created by appellee, this Court was not squarely presented with issues addressing whether Rule 238 is "procedural" or "substantive." Rather, the questions presented in *Laudenberger* all related to the constitutionality of Rule 238 under the Equal Protection and Due Process Clauses,—challenges that do not turn on whether the rule is substantive or procedural in nature.[6]

[5] This Court's denial of certiorari in *Humphries v. Pittsburgh & Lake Erie Railroad Co.*, 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert. denied*, _____ U.S. _____, 106 S. Ct. 179 (1985), is of course entitled to no significance. *Humphries* was a decision by a Pennsylvania intermediate appellate court over which the Pennsylvania Supreme Court declined to exercise its discretionary review. Now that the Pennsylvania Supreme Court has addressed the issue, and failed to correct the erroneous decision in *Humphries*, the issue is ripe for resolution by this Court.

[6] The constitutional nature of the challenges in *Laudenberger* also made discussion of the purpose of the state rule appropriate in that case. *See, Laudenberger*, 436 A.2d at 156 (constitutional standard of due process includes consideration of "objectives sought to be attained.") As noted above, such considerations are not material to questions of federal preemption.

Appellee's discussion of 28 U.S.C. §1961 and awards of interest under other federal statutes (Motion to Dismiss at 8) attempts to evade precepts which have been well-established under the FELA. First, although neither the FELA nor 28 U.S.C. §1961 expressly prohibit prejudgment interest, the unwaivering line of prior authority holds that as a matter of statutory construction, not discretion, prejudgment interest is not recoverable under the FELA. Thus, despite the rule urged by appellee, he cannot point to a single discretionary award of prejudgment interest in an FELA case and the FELA is conspicuously, but with reason, absent from the litany of statutes recited in his motion.[7] Appellee's argument also totally ignores this Court's decision in *Rodgers v. United States*, 332 U.S. 371 (1947), which held that prejudgment interest is available under a federal statute which is silent on the matter only when the "congressional intent" and total statutory scheme allow the award. Neither appellee nor the Pennsylvania courts identified any such requirement in the intent and scheme of the FELA. *Cf. Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44 (M.D. Pa. 1984) ["To grant prejudgment interest would undermine the equities that have been balanced by the [FELA] itself"].

Finally, appellee further attempts to mislead this Court by his description of the Pennsylvania Supreme Court's decision in *Craig v. Magee Memorial Rehabilitation*

[7] Appellee's inclusion of "Jones Act claims" among this listing is also misleading. Actions under the Jones Act, 46 U.S.C. §688, may be brought both at law and in admiralty and it is only in those cases brought in admiralty that some courts have recognized a discretionary allowance of prejudgment interest. Any such award, therefore, is a function of the principles of admiralty, not a construction of the Jones Act, which does not allow prejudgment interest. "[I]t is well settled that in an action at law under the Jones Act, the recovery of prejudgment interest is not permitted. . . ." *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985) [drawing admiralty/law distinction].

Center, _____ Pa. _____, 515 A.2d 1350 (1986), and by ascribing to it illogical consequences. *Craig*, which the Pennsylvania Supreme Court decided before its decision in this case, does not moot the issue of Rule 238's validity or the vitality of this controversy. For *Craig* did not announce an end to Rule 238's imposition of prejudgment interest or even a temporal limitation on its application—it merely suspended that aspect of Rule 238 which had resulted in an automatic assessment of prejudgment interest against a defendant without fault.[8] In its place, the Court instituted the requirement of a petition by plaintiff and a hearing thereon and stated that the procedure will be in effect until formal rule-making procedures are completed. Certainly, *Craig* did not contemplate—as appellee suggests—that Rule 238 as ultimately revised would abolish awards of prejudgment interest. Indeed, *Craig* contemplated the continuation of such awards under a revised rule. *See* 515 A.2d at 1353.

Nor do the modified mechanics of assessment prescribed by *Craig* reduce forum-shopping as contended by appellee. The promise of prejudgment interest—with or without a hearing—being awardable in one tribunal but not another necessarily spawns forum-shopping. It also destroys the uniformity required by the FELA. Lastly, even if *Craig* had made future awards of prejudgment interest in Pennsylvania less predictable—which it did not—it would do nothing to diminish the importance of the issue presented for consideration by this Court. Unless the decision of the Pennsylvania Supreme Court is reversed, prejudgment interest will continue to be sought and awarded in FELA

[8] Even prior to *Craig*, Rule 238 imposed conditions on the award. Other conditions, which are not affected by *Craig*, include the recovery by plaintiff of more than 125% of a written offer made by defendant and continued in effect until commencement of trial. *See* Pa.R.Civ.P. 238(e).

cases brought in Pennsylvania state courts. Moreover, the Pennsylvania Supreme Court's decision in this case will have undoubted effects on FELA cases adjudicated in other states now awarding prejudgment interest, and will generate confusion and uncertainty concerning the propriety of such awards unless this Court considers this case.

B. Appellee's Motion Also Demonstrates The Trial Court's Violation Of This Court's Mandate In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

Appellee's motion also reveals a need for this Court to consider as well the trial court's automatic application of the "total offset" rule to this case and the affirmance of that ruling by the appellate courts of Pennsylvania. Although appellee professes that the Pennsylvania courts "understand" this Court's holding in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), appellee's motion and the record in this case demonstrate the contrary.

First, it is undeniably clear that the trial court blindly followed state decisional law in applying the "total offset" rule—the very practice condemned by *Pfeifer's* requirement that the selection of a present value method be a "deliberate choice." 462 U.S. at 553. That the Pennsylvania appellate courts undertook to justify that selection, as they did, reflects a fundamental misapprehension of this Court's mandate.

Second, the lack of understanding is made more apparent by the Pennsylvania courts' rationale that the trial court's failure to instruct the jury that an award of future earnings must be reduced to present value was justified by MSW's failure to offer evidence on methods of reduction. It was, of course, appellee's burden as plaintiff to prove his

damages, and it was not MSW's obligation to have anticipated the trial court's refusal to follow applicable federal law and offer evidence on the matter.[9] *See DiSabatino v. National R.R. Passenger Corp.*, 724 F.2d 394, 396 (3d. Cir. 1984). [Court remanded FELA case for damages retrial where trial court followed "total offset" rule; court specifically rejected argument that verdict should stand because defendant-railroad had not produced evidence of present worth, finding it "had no such burden"]. Moreover, the trial court's blind adherence to state law would have made such evidence irrelevant in any event. Finally, contrary to the argument of appellee, the jury's award for impairment of future earning power appears to have been substantial, since plaintiff's past lost earnings and other special damages constituted only a fraction of the jury's award. Accordingly, the error of the trial court cannot be deemed *de minimis*.

[9] The MSW did submit a requested instruction for reducing any award for loss of future earnings to their present value but this request was denied by the trial court.

Conclusion

For the reasons set forth herein and in the Jurisdictional Statement, appellant requests this Court to deny appellee's motion to dismiss or affirm and to grant plenary consideration of the questions presented by this appeal.

Respectfully submitted,

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SUPPLEMENTAL

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TABLE OF AUTHORITIES.

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Appellant, the Monessen Southwestern Railway Company (the "MSW"), submits the within Supplemental Brief in accordance with Supreme Court Rule 16.6 to invite the Court's attention to two recent decisions of two federal courts of appeal which underscore the importance and substantiality of the federal questions presented by this appeal. Those

decisions are *Poleto v. Consolidated Rail Corporation*, (Nos. 86-5249, 86-5250) (3d Cir. August 19, 1987) (Becker, J.) and *Wildman v. Burlington Northern Railway Company*, (No. 86-4194) (9th Cir. August 24, 1987) (Ferguson, J.).[1] Both cases involve the question whether prejudgment interest is awardable in FELA actions and both conclude, after considered judgment and thorough analysis of the purposes and policies of the FELA, that it is not. Furthermore, in *Poleto* the Third Circuit specifically considered and categorically rejected the argument that Pa.R.Civ.P. No. 238 justifies such an award:

> "We note at the outset of our analysis that the availability of interest in an action arising under a federal statute is governed by federal law, not the law of the forum state. [Citing cases.] Because Poleto's claim is predicated upon a violation of a federal statute, state substantive law, particularly Pennsylvania Rule of Civil Procedure 238, is not implicated. [Citing case.] Any claim to prejudgment interest must therefore be derived from federal statutory sources." *Poleto, supra*, slip op. at 8-9.

The Third Circuit has thus rejected the sole basis for the award of prejudgment interest in this case. As a consequence, unless this Court considers and reverses the judgment in this case, FELA litigants in Pennsylvania will be accorded substantially different treatment depending upon whether they file their cases in the state or federal trial courts. In the face of Congress' intent that the law applicable to FELA claims

[1] Counsel has been advised that the Court receives copies of the slip opinions of the courts of appeals at or about the time they are filed. For this reason, and because these opinions are lengthy and involve issues in addition to the question of the propriety of an award of prejudgment interest under the FELA, they have not been reproduced as an Appendix to this Supplemental Brief.

shall be uniform throughout the nation, FELA litigants in the federal and state courts of Pennsylvania within the very same city will not even have the same law applied to their claims. Such discriminatory treatment and frustration of Congressional intent cannot be countenanced—appellant submits that it should be corrected by this Court's reversal of the judgment of the Supreme Court of Pennsylvania.

In addition to summarily rejecting any suggestion that Pa.R.Civ.P. No. 238 can be used to justify an award of prejudgment interest in an FELA case, the opinion of Judge Becker for the Third Circuit in *Poleto* analyzes all of the truly relevant considerations on the question whether prejudgment interest can be awarded under the FELA. Observing that the great weight of authority is to the contrary, the court points out that the question is still an open one in the Third Circuit. *Id.* at 7. Since both the general federal interest statute, 28 U.S.C. §1961, and the FELA itself are silent on the question of prejudgment interest, the court then analyzes the congressional purposes and policies of the FELA in an effort to resolve the question in accordance with the guidelines laid down by this Court in *Rodgers v. United States*, 332 U.S. 371, 373 (1947). *Poleto*, slip op. at 9-10. Acknowledging this Court's repeated pronouncements that the FELA should be read expansively to secure full recompense for injured railroad workers, the court analyzes the only federal case to approve such an award, *Garcia v. Burlington Northern R.R.*, 597 F.Supp. 1304 (D. Colo. 1984), noting that *Garcia* has been overruled by the court of appeals of its own circuit in *Wilson v. Burlington Northern Ry. Co.*, 803 F.2d 563 (10th Cir. 1986).[2] *Id.* at 11. After fully considering the policy

[2] In addition, *Garcia* itself has been reversed on other grounds by the Tenth Circuit, 818 F.2d 713 (10th Cir. 1987).

arguments advanced by the district court in *Garcia* to justify its award of prejudgment interest in that case (*Id.* at 11-16) and observing that "there is an excellent case that an award of prejudgment interest for past economic loss would further the goal of liberal recovery that underlies the FELA" (*Id.* at 17), the Third Circuit states that it is compelled, nonetheless, by other considerations to rule that the FELA does not authorize such an award. *Id.* at 18. The considerations which lead the court to that conclusion include: (i) the fact that, at the time of its enactment, Congress did not intend to permit an award of prejudgment interest under the FELA; (ii) that the FELA represented a delicate Congressional balancing of the rights of workers and railroads, including abrogation of the railroads' common law defenses but not negation of the then-established rule against awarding prejudgment interest in personal injury cases; (iii) that Congressional silence and inaction in the face of eighty years of judicial precedent consistently interpreting the FELA as not permitting prejudgment interest indicates that Congress approves that precedent; and (iv) that, in these circumstances, any authority for an award of prejudgment interest in FELA cases must come from Congress and not the courts. *Id.* at 18-20.

Although not so fully expository in articulating its rationale for reaching the same conclusion in *Wildman v. Burlington Northern R.R. Co.* (9th Cir. August 24, 1987), the Ninth Circuit, nonetheless, adopts the same line of reasoning and concludes that the FELA does not authorize prejudgment interest and the policy arguments in favor of such awards must be addressed to Congress. *Id.* 9-10.

These ink-fresh decisions of two federal courts of appeals thus underscore the importance and substantiality of the questions presented by this appeal. For the reasons so well stated by those courts, appellant submits that this Court should rule that an award of prejudgment interest is not authorized by the FELA or other federal law. But whatever conclusion the Court may reach on the merits of this question, these cases clearly demonstrate that a state rule of civil procedure cannot be used to justify an award of prejudgment interest in an FELA case. Yet unless this Court considers and reverses the judgment of the Supreme Court of Pennsylvania in this case, the state courts of Pennsylvania—and perhaps those of other states—will sanction awards of prejudgment interest in FELA cases on the basis of wholly inappropriate state court rules or state statutes concerning prejudgment interest.

For the foregoing reasons and those set forth in appellant's jurisdictional statement and brief in opposition to appellee's motion to dismiss or affirm, appellant submits that the Court should deny appellee's motion to dismiss or affirm and grant plenary consideration of this appeal.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

MOTION FILED
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No. 86-1743

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MONESSEN SOUTHWESTERN RAILWAY CO.,
Appellant,

v.

GERALD L. MORGAN,
Appellee.

On Appeal from the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT

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Appellee.

On Appeal from the Supreme Court of Pennsylvania

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads ("AAR") respectfully moves for permission to file the attached Brief *Amicus Curiae*. This motion is being filed under Rule 36.1.[1] Counsel for appellant has consented to the filing of this brief,[2] and counsel for appellee has not.

---

[1] The brief is timely filed under Rule 36.1 since it has been submitted within the time allowed for filing the motion to dismiss.

[2] The letter expressing such consent has been filed with the Clerk of the Court.

The AAR is a voluntary, unincorporated, non-profit trade organization headquartered in Washington, D.C. Its members include almost all of the Class I railroads and numerous non-Class I railroads in the United States.[5] The AAR requests to file a brief *amicus curiae* only when the issue presented in a case is of overriding concern to the railroad industry nationwide; on those occasions such requests have been granted.[6]

This case involves the recurring question of whether a state court may apply a state rule which provides for prejudgment interest in a case brought under a federal statute which does not. Application of Pennsylvania's prejudgment interest rule collides with the rule hitherto enforced under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) ("FELA"), barring an award of prejudgment interest. It conflicts with the rules followed by other state and federal courts in FELA cases and threatens a dramatic increase in the burden of FELA liability. The resolution of this appeal will directly and significantly affect the entire railroad industry, and not just the individual railroad involved in the litigation below.

The AAR represents the vast majority of the nation's railroads, and acts in this case, as in others, with the assistance of counsel for several railroads. The AAR is thus able to present factual information and legal analysis that will illuminate the larger importance and the industry-wide consequences of the decision rendered in the present case.

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[5] A listing of the membership of the organization appears at Appendix A to the attached brief.

[6] *See Burlington Northern R.R. v. Oklahoma Tax Commission*, No. 86-337 (filed Dec. 12, 1986); *Burlington Northern R.R. v. Anderson*, No. 85-1544 (filed May 16, 1986); *Burlington Northern R.R. v. Canby*, No. 84-1313 (filed March 18, 1985); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 450 U.S. 336 (1982); *Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980).

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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Appellee.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT

INTERESTS OF THE *AMICUS CURIAE*

The Association of American Railroads ("AAR") is the non-profit trade association for the nation's railroads. Its members account for approximately ninety-three percent of the freight revenues of all railroads in the United States. On matters of common concern, AAR represents its member railroads before courts, agencies and the United States Congress.

The nation's railroads necessarily have a compelling interest in the administration of the Federal Employers'

Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1982). More than 3,000 FELA claims are filed by railroad employees against their employers each year. In 1986 alone, the railroads paid more than one half billion dollars in FELA death and personal injury claims.[1]

The principal issue posed in this appeal arose when the Court of Common Pleas of Allegheny County, Pennsylvania, applying that State's Rule 238, added a charge for "delay damages" of ten percent per annum to the amount awarded to appellee Morgan by the jury with respect to his FELA claim.[2] In the Pennsylvania courts, appellant Monessen Southwestern Railway challenged this prejudgment interest award on the ground that Rule 238 is preempted by the FELA.[3] In recognition of the importance of the issue, the AAR filed a brief *amicus curiae* in the Pennsylvania Supreme Court.[4] Several individual railroads operating in Pennsylvania also filed a brief *amici curiae*, arguing that Rule 238 was preempted by federal law.[5] Nevertheless, the Pennsylvania Supreme Court upheld application of this state prejudgment interest rule. It reasoned that "the prejudgment interest

[1] Through surveys of its member railroads, the AAR has estimated that in 1986, the industry collectively paid over $580 million to employees for FELA death and personal injury claims.

[2] Appellee's recovery was thereby increased from $125,000 to $151,712.50.

[3] *See, e.g.*, Brief for Appellant at 16, *Morgan v. Monessen Southwestern Ry.*, 518 A.2d 1171 (Pa. 1986) ("the rule [238] has no application to an FELA action because the substantive aspects of FELA actions are governed exclusively by federal law").

[4] Brief for *Amici Curiae*, the AAR and the National Association of Railroad Trial Counsel, at 10, *id.* ("[the] decision that state law may be applied to impose prejudgment interest in an FELA action is erroneous, for the field has been preempted").

[5] Brief for *Amici Curiae*, the Consolidated Rail Co. and the B&O Railroad Co., at 4, *id.* ("federal law precludes the application of Pa. R.C.P. 238 to actions arising under the [FELA]").

provisions of Rule 238 [do not] contravene any provisions of the federal act" because "[t]his Court has the right to institute procedural rules designed to alleviate congestion in the trial court."[6]

The ruling of the Pennsylvania Supreme Court is inconsistent with nearly eighty years of federal and state precedents which reject awards of prejudgment interest in FELA actions. Insofar as the decision conflicts with other state and federal rulings and makes the financial outcome of FELA cases dependent on local rules, it threatens to disrupt seriously the uniform application of the FELA. The holding below also wrongly increases damage awards in state courts in Pennsylvania, a major railroad state.[7] To the extent it is followed in the numerous other states with similar prejudgment interest rules, it will have a serious financial impact on the nation's railroads. For these reasons, AAR submits this brief requesting Supreme Court review of this significant, unwarranted interpretation of the FELA.[8]

[6] *Id.* at 1177. As this statement illustrates, the Pennsylvania courts recognize that Rule 238 involves prejudgment interest despite the reference to "delay damages."

[7] At least forty-five different railroads operate in Pennsylvania, covering almost 7,000 miles of railroad trackage. *See* Rand McNally, Railroad Atlas 61 (1985).

[8] *Amicus curiae* agrees that this case presents a proper appeal under 28 U.S.C. § 1257(2) (1966) for the reasons stated in appellant's jurisdictional statement at 3-4. Moreover, in a broader sense, this case falls within the intendment of this Court's appellate jurisdiction, "reserved [as it is] for cases threatening the supremacy of federal law," *Key v. Doyle*, 434 U.S. 59, 67 (1977), because it involves a collision between a state rule of general applicability and a federal statute governing a large class of cases brought in state court.

SUMMARY OF ARGUMENT

The court below erred in holding that a state rule providing for prejudgment interest can be applied to increase a judgment in an FELA case. State courts have concurrent jurisdiction with respect to FELA actions, 45 U.S.C. § 56, but they must apply federal law, not state law, in matters that touch upon the measure of damages under the FELA. The proper measure of damages is inseparably connected to the right of action under the FELA and states are not free to alter this basic federal right. *See* cases cited *infra* at 6.

The rule under federal law with respect to prejudgment interest is clear. The statute by its terms does not provide for an award of prejudgment interest—and eighty years of case law consistently has affirmed that this was no mere oversight, but instead reflects the intention of Congress that prejudgment interest not be awarded in FELA actions. *See* cases cited *infra* at note 10.

The Pennsylvania court's reasoning that it has the "right to institute procedural rules" is unpersuasive. The sole remedy under the FELA is a monetary award and the elements of the award, such as prejudgment interest, are part of the substantive law of the FELA. Courts long have recognized that Congress crafted a particular balance of equities in the FELA, enlarging the rights of railroad employees by taking away from the railroads various common law personal injury defenses. *See* cases cited *infra* at note 17. Congress did not, however, give plaintiffs the additional remedy of prejudgment interest. Such a remedy would have been extraordinary for 1908, a time when interest on "unliquidated" personal injury judgments was uniformly rejected. *See Wilson v. Burlington Northern R.R.*, 803 F.2d 563, 564-65 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1604 (1987). Because the federal rule denying prejudgment interest is part of the substantive law of the FELA, it preempts Pennsylvania Rule 238, regardless of whether the state courts characterize this rule as "procedural."

The unwarranted Pennsylvania decision raises an issue of federal law which is of great importance to the nation's railroads. The Pennsylvania decision creates a conflict between the rules applied in FELA actions brought in state courts in Pennsylvania and those applied in the federal district courts in that same state. *Compare Morgan*, 518 A.2d at 1177 (Pa. 1986), *with Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125, 127 (E.D. Pa. 1984), *and Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44, 48 (M.D. Pa. 1984). It is inconsistent with decisions of state courts in contiguous states. *See, e.g., Wicks v. Central R.R.*, 129 N.J. Super. 145, 322 A.2d 488, 489, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974); *Murmann v. New York, N.H. & H. R.R.*, 258 N.Y. 447, 180 N.E. 114, 115 (1932). Moreover, should the thirty other states with similar prejudgment interest rules apply such rules in FELA actions, intrastate and interstate conflicts alike will proliferate, and a patchwork of varying state interest statutes will supplant the nationwide uniform system of damages under the FELA.

If this decision is permitted to stand, it may also have a serious financial impact on the nation's railroads. Total FELA damages are annually over $580 million. At least thirty-one states have prejudgment interest rules that could conceivably be invoked in state court FELA actions. *See* statutes cited *infra* at note 34. Should a significant number of courts in such other states take their cue from the Pennsylvania Supreme Court and assess prejudgment interest in FELA actions, FELA payouts for the nation's railroads will increase exponentially.

The present controversy will not be resolved by the state or federal courts of Pennsylvania, which have reached contrary conclusions concerning prejudgment interest under the FELA while aware of each other's contrary holdings. This Court should resolve the conflict

because the holding of the Pennsylvania Supreme Court threatens to undermine the deliberate goal of the FELA to provide consistent damage awards for railroad employees nationwide and because of the economic significance of the decision for the nation's railroads.

ARGUMENT

I. The Decision Below, Upholding Application of the State's Prejudgment Interest Rule in an FELA Action, Fails to Recognize the Preemptive Effect of the FELA

The FELA supersedes "any state law trenching on the province of the Act." *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 371 (1953). The court below failed to respect this basic principle in deciding to apply the state's own prejudgment interest rule despite clear federal law barring an award of such interest in FELA actions.

A. Federal Law Precludes the Award of Prejudgment Interest

The FELA confers jurisdiction over FELA actions on state courts concurrent with federal district courts. 45 U.S.C. § 56 (1982). However, in excercising that concurrent jurisdiction, state courts are bound by federal decisions interpreting the FELA.[9] The Supreme Court has affirmed consistently that federal decisional law governs the amount of damages recovered under the FELA. "[T]he question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act, it must be settled according to general principles of law as administered in the Federal courts." *Chesapeake & Ohio R.R. v. Kelly*, 241 U.S. 485, 491 (1916); *accord St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409, 411 (1985). A state court forum does not change this result: "it

[9] *See Urie v. Thompson*, 337 U.S. 163, 174 (1949); *Duggs v. Kansas City Southern Ry.*, 473 F.2d 821, 826-27 (5th Cir.), *cert. denied*, 414 U.S. 823 (1973).

has long been settled that questions concerning the measure of damages in an FELA action are federal in character. . . . This is true even if the action is brought in state court." *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 (1980); *accord Dickerson, supra.*

The federal rule under the FELA with respect to the assessment of prejudgment interest is clear: prejudgment interest is unavailable in FELA cases. A line of precedent, almost unbroken and spanning nearly eighty years, has consistently denied prejudgment interest in FELA actions.[10] As far as we have been able to ascer-

[10] Federal Decisions: *Wilson v. Burlington Northern R.R.*, 803 F.2d 563, 566 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1604 (1987); *Newman v. Grand Trunk Western R. Co.*, 781 F.2d 55, 56 (6th Cir. 1985); *Lindsey v. Louisville & Nashville R.R.*, 775 F.2d 1322, 1325 (5th Cir. 1985); *Faulkenberry v. Louisiana & Arkansas Ry.*, 551 F.2d 650, 651 (5th Cir. 1977); *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238, 1244 (6th Cir. 1971); *Powers v. New York Central R.R.*, 251 F.2d 813, 818 (2d Cir. 1958); *Briggs v. Pennsylvania R.R.*, 164 F.2d 21, 22 (2d Cir. 1947), *aff'd*, 334 U.S. 304 (1948); *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847, 848-49 (5th Cir. 1944); *Chicago, M., St. P. & P. R.R. v. Busby*, 41 F.2d 617, 619 (9th Cir. 1930); *Mahan v. Metro-North Commuter R.R.*, No. 86 Civ. 0922 (JFK), slip op. at 4 (S.D.N.Y. Mar. 9, 1987); *Earl v. Chesapeake & Ohio Ry.*, No. 83-3040, slip op. at 4 (S.D. W. Va. June 26, 1985); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125, 127 (E.D. Pa. 1984); *Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44, 48 (M.D. Pa. 1984); *Murphy v. Leigh Valley R.R.*, 63 F. Supp. 928, 930 (E.D.N.Y. 1945), *modified*, 158 F.2d 481 (2d Cir. 1946).

State Decisions: *Carmouche v. Southern Pacific Transp.*, No. 01-86-0083-CV (Tex. Ct. App. May 21, 1987); *Melin v. Burlington Northern R.R.*, 401 N.W.2d 418, 420 (Minn. Ct. App. 1987); *Felder v. Union Pacific R.R.*, 660 P.2d 911, 914-15 (Colo. Ct. App. 1982); *Wicks v. Central R.R.*, 129 N.J. Super 145, 322 A.2d 488, 489, *cert. denied*, 66 N.J. 317, 317 A.2d 17 (1974); *Hanley v. Erie R.R.*, 81 N.Y.S.2d 100, 101 (1948); *Ketchum v. Boston & M. R.R.*, 249 App. Div. 901, 292 N.Y.S. 567, 568 (1937); *Murmann v. New York, N.H. & H. R.R. Co.*, 258 N.Y. 447, 180 N.E. 114, 115 (1932); *Mobile & O. R.R. v. Williams*, 219 Ala. 238, 121 So. 722, 731 (1929); *Bennett v. Atchison, T. & S.F. Ry.*, 187 Iowa 897, 174 N.W. 805, 807 (1919); *Grow v. Oregon Short Line R.R.*, 47 Utah 26, 150 P. 970, 971 (1915); *Norton v. Erie R.R.*, 163 A.D. 468, 148 N.Y.S. 771, 772 (1914).

tain, only the federal district court in Colorado has ever allowed such interest,[11] and that lone decision has now been overruled by the Court of Appeals for the Tenth Circuit.[12]

The roots of the federal rule denying prejudgment interest in FELA actions are substantive. As courts have uniformly recognized,[13] at the time Congress enacted the FELA, interest could accrue only on liquidated amounts. Thus, interest on personal injury claims accrued only *after* judgment.[14] The FELA provided a federal cause of action for precisely this type of claim. Moreover, the Act "envisaged a recovery for pain and suffering and for injuries to the date of trial and thereafter." *Moore-McCormack Lines*, 295 F.2d at 593. As numerous courts have recognized, prejudgment interest is not properly considered on all these elements and cannot practicably be awarded where juries return general verdicts including both these elements and some allowance for loss caused by delay.[15] Consequently, prejudgment interest under the FELA was neither legally justifiable, nor feasible.

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[11] *Garcia v. Burlington Northern R.R.*, 597 F. Supp. 1304 (D. Colo. 1984).

[12] The District Court decision in *Garcia* was reversed on procedural grounds. *Garcia v. Burlington Northern R.R.*, No. 84-1318 (10th Cir. Apr. 22, 1987). However, the Tenth Circuit had already indicated its substantive disagreement with the result. *See Wilson*, 803 F.2d at 566.

[13] *Wilson*, 803 F.2d at 565; *Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 593 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962); *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d at 848; *Chicago, M., St. P. & P. R.R. v. Busby*, 41 F.2d at 619; *see also Bennett v. Atchison, T. & S.F. Ry.*, 187 Iowa 897, 174 N.W. at 807.

[14] *See* C. McCormick, Damages §§ 51, 56 (1935).

[15] *See Wilson*, 803 F.2d at 565; *Newman*, 781 F.2d at 56; *Barrios*, 465 F.2d at 1168; *Moore-McCormack Lines*, 295 F.2d at 594; *National Airlines v. Stiles*, 269 F.2d 400, 406 (1959).

Furthermore, courts have also recognized that the absence of prejudgment interest was an aspect of the bargain struck by Congress in crafting the FELA.[16] As part of this bargain, the FELA enlarges substantially the rights of employees, stripping the railroads of various common law defenses and permitting recovery of damages from the railroad if its negligence played any role—no matter how small—in an employee's injury.[17] Congress did not, however, take the additional, "radical" step of providing for the allowance of prejudgment interest. *Wilson*, 803 F.2d at 564-65.

In light of the origins of the FELA, the consistent line of precedent rejecting prejudgment interest, and the absence of any congressional modification of this aspect of the law over the years,[18] courts that have recently attempted to ascertain congressional intent have refused to grant prejudgment interest in FELA cases. These courts have emphasized that the additional interest charge would "undermine the equities that have been balanced by the Act itself." *Camplese*, 594 F. Supp. at 47-48; *accord Wilson*, 803 F.2d at 565; *Carver*, 600 F. Supp. at 126-

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[16] *See Wilson*, 803 F.2d at 564-65; *Earl v. Chesapeake & Ohio Ry.*, No. 83-3040, slip op. at 4 (S.D. W. Va. June 26, 1985); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. at 127; *Camplese v. Consolidated Rail Corp.*, 594 F. Supp. at 47.

[17] *Id. See also Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326, 329 (1958); *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 506-08 (1957).

[18] Although courts have denied prejudgment interest in FELA cases for nearly 80 years, Congress has never seen fit to alter this rule. In addition, when 28 U.S.C. § 1961 was recently amended to provide for uniform post-judgment interest rates under federal law, consideration was given to a provision authorizing the award of prejudgment interest. *See* S. Rep. No. 275, 97th Cong., 1st Sess. 11-12 (1982). That provision was dropped, however, during Senate deliberation. 127 Cong. Rec. S14699 (daily ed. Dec. 8, 1981) (statement of Sen. Grassley).

27; *Earl v. Chesapeake & Ohio Ry.*, No. 83-3040, slip op. at 4 (S.D. W. Va. June 26, 1985).[19]

B. The Allegedly Procedural Nature of Rule 238 Does Not Save It from Federal Preemption

In concluding that "the prejudgment interest provisions of Rule 238 [do not] contravene any provision of the federal act," 518 A.2d at 1177, the court below offered the following rationale:

> This Court has the right to institute procedural rules designed to alleviate congestion in the trial courts. . . . A rule of procedure, such as Rule 238, . . . is properly applied to FELA cases brought in Pennsylvania courts.[20]

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[19] In *Rodgers v. United States*, 332 U.S. 371, 373 (1947), which was not an FELA case, this Court held that, if a federal statute is silent with respect to prejudgment interest, such interest is available only where the "congressional purpose" of the statute requires that result. Indeed, in *Rodgers*, the Court considered specifically the "relative equities between the beneficiaries of the obligation and those upon whom it has been imposed" and declined "to add interest to those very substantial penalties already imposed . . . ." Numerous post-*Rodgers* FELA cases have considered congressional intent and the relative equities and affirmed that Congress did not intend to award prejudgment interest in FELA actions. *See, e.g., Wilson*, 803 F.2d at 565; *Carver*, 600 F. Supp. at 126-27; *Camplese*, 594 F. Supp. at 47-48.

[20] *Id.* (citation omitted). The court below also suggested an alternative ground for its holding: the FELA endorses the award of prejudgment interest when the remedy is based upon and supported by state law. *Id.* at 1176. To reach this conclusion, the court cited *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984), a case that applied a state prejudgment interest rule under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356 (1986). *Olsen* is, however, entirely inapposite to decisions under the FELA. OCSLA, the statute at issue in *Olsen*, *expressly* incorporates the state laws of lands adjacent to the shelf, and the *Olsen* court based its decision with respect to prejudgment interest on this fact. *Id.* at 984. There is no comparable provision in the FELA. Accordingly, the conclusion of the court below on this point is entirely without foundation. *See, e.g., Carver*, 600 F. Supp. at 127 (rejecting OCSLA analogy).

But as the three dissenting judges emphasized,[21] the court's reasoning fails to recognize that the preemptive scope of the federal statute does not turn on the characterization, or stated purpose, of the state rule, but on the degree to which such rule interferes with the congressional design.[22] Rule 238 is preempted because it legislates upon an issue which, for litigants under the FELA, is resolved by federal law. At least three different bodies of case law compel this conclusion.

First, a well-established line of federal precedent holds that the FELA rule barring prejudgment interest involves a question of substantive federal law. In a leading case on the availability of prejudgment interest in an FELA action, the Fifth Circuit observed:

> The item of accrued interest presents a question of substantive law. We think, therefore, that the silence of the federal statute upon the subject of interest may not be construed as leaving the subject unlegislated upon in the Act, but is indicative of the considered purpose that no interest should be allowed in [FELA] actions prior to verdict.

Louisiana & Arkansas Ry. v. Pratt, 142 F.2d 847, 848-49 (5th Cir. 1944); *see also Garcia v. Burlington Northern R.R.*, No. 84-1318 (10th Cir. Apr. 22, 1987) ("[i]f plaintiff is entitled to any prejudgment interest, it must be as a portion of his damages"); *Murphy v. Leigh Valley R.R.*, 63 F. Supp. 928 (1945), *modified*, 158 F.2d 481 (2d Cir. 1946) ("the right to interest on [FELA] verdicts or judgments is a question of substance"). Viewing the issue of prejudgment interest as a substantive congressional determination, federal courts have repeat-

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[21] *Morgan*, 518 A.2d at 1177-79.

[22] *See Shaw v. Delta Air Lines*, 463 U.S. 85, 95 (1983) ("[i]n deciding whether a federal law pre-empts a state [law], our task is to ascertain congressional intent in enacting the federal statute at issue"); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) ("[t]he purpose of Congress is the ultimate touchstone").

edly rejected efforts to apply state law on the issue of prejudgment interest in FELA cases.[23]

Second, the holding below is inconsistent with a significant number of *state* courts which have emphasized that the federal law under the FELA is "paramount," "exclusive" and "occupies the field" with respect to the measure of damages, including prejudgment interest. State courts outside of Pennsylvania have generally declined to award prejudgment interest in FELA cases, even when applicable state rules would have required such an award.[24]

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[23] *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847, 848 (5th Cir. 1944); *Chicago, M., St. P. & P. R.R. Co. v. Busby*, 41 F.2d 617, 619 (9th Cir. 1930); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125, 127 (E.D. Pa. 1984); *Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44, 45 (M.D. Pa. 1984); *Murphy v. Leigh Valley R.R.*, 63 F. Supp. 928, 930 (E.D.N.Y. 1945), *aff'd*, 158 F.2d 481 (2d Cir. 1946); *see also Lindsey v. Louisville & Nashville R.R.*, 775 F.2d 1322, 1325 (5th Cir. 1985); *Faulkenberry v. Louisiana & Arkansas Ry.*, 551 F.2d 650, 651 (5th Cir. 1977); *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238, 1244 (6th Cir. 1971); *Earl v. Chesapeake & Ohio Ry.*, No. 83-3040, slip op. at 4 (S.D. W. Va. June 26, 1985).

Support for the proposition that state prejudgment interest laws may not be applied in FELA cases may also be found in cases arising under the Jones Act, 46 U.S.C. § 688 (1982). This maritime statute adopts the provisions of the FELA in connection with personal injury actions, and has therefore been held to have the same interpretation. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958); *Engel v. Davenport*, 271 U.S. 33 (1926). Federal courts interpreting the Jones Act have held consistently that state prejudgment interest statutes are preempted by federal law. *See Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972); *Casey v. American Export Lines*, 173 F.2d 324 (2d Cir.), *rev'd on other grounds*, 176 F.2d 337, *cert. denied*, 338 U.S. 885 (1949); *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622 (6th Cir. 1948); *Cortes v. Baltimore Insular Line*, 66 F.2d 526 (2d Cir. 1933); *Duvernay v. Alcoa Steamship Co.*, 217 F. Supp. 698 (E.D. La. 1963).

[24] *See Carmouche v. Southern Pacific Transp.*, No. 01-86-0083 (Tex. Ct. App. May 21, 1987) (attached for convenience at Appendix B); *Melin v. Burlington Northern R.R.*, 401 N.W.2d 418, 420 (Minn. Ct. App. 1987); *Felder v. Union Pacific R.R.*, 660 P.2d 911, 915 (Colo. Ct. App. 1982); *Wicks v. Central R.R.*, 129 N.J. Super. 145, 322 A.2d 488, 489, *cert. denied*, 66 N.J. 317 (1974); *Hanley v. Erie R.R.*, 81 N.Y.S.2d 100, 101 (1948); *Murmann v. New York, N. H. & H. R.R.*, 258 N.Y. 447, 180 N.E. 114, 115 (1932); *Mobile & O. R. Co. v. Williams*, 121 So. 722, 731 (Ala. 1929); *Norton v. Erie R.R.*, 163 App. Div. 468, 148 N.Y.S. 771, 772 (1914).

State court Jones Act cases have similarly held that plaintiffs may not recover prejudgment interest on the basis of state prejudgment interest rules: *Sutton v. Central Gulf Lines*, 433 So.2d 888, 894 (La. Ct. App. 1983); *Rains v. Diamond M. Co.*, 396 So.2d 306, 313 (La. Ct. App. 1981), *cert. denied*, 455 U.S. 938 (1982); *Shemman v. American Steamship Co.*, 89 Mich. App. 656, 280 N.W.2d 852, 861 (1979); *Morris v. Transworld Drilling Co.*, 365 So.2d 46, 47 (La. Ct. App. 1978).

[25] In accordance with *Jarvis*, a number of federal courts of appeal have concluded that state prejudgment interest rules are substantive and should be applied in diversity actions. *See* cases cited in *Jarvis*, 668 F.2d at 746-47.

Third, the reasoning of the Court below is inconsistent with specific decisional law surrounding Rule 238. In *Jarvis v. Johnson*, 668 F.2d 740, 745 (3d Cir. 1982), the Third Circuit held that Rule 238 should be applied in federal diversity actions arising under Pennsylvania law because of its substantive impact on the amount of the verdict.

> While Rule 238 may have been designed to expedite the processing of litigation in Pennsylvania, its application nevertheless results in increasing the amount of damages a plaintiff can receive and a defendant must pay, over the amount of damages that would be awarded in the absence of the Rule. . . .
>
> . . . [T]he difference between the application and the nonapplication of Rule 238 in terms of a plaintiff's ultimate recovery can be quite substantial. Indeed with jury verdicts in many classes of cases running into six and seven figures, prejudgment interest can represent a not inconsiderable portion of a plaintiff's damages.[25]

Even the Pennsylvania Supreme Court has recognized the substantive aspects of Rule 238: "Rule 238 embodies both

procedural and substantive elements. Its purpose and effect are procedural, yet its performance will touch upon substantive rights of both parties." *Laudenberger v. Port Authority*, 496 Pa. 52, 436 A.2d 147, 155 (1981).

Because the availability of prejudgment interest has a significant substantive impact on the rights of both parties under the FELA, the asserted "procedural" function of Rule 238 is no answer to the clear federal rule which precludes prejudgment interest under the FELA. Courts may not immunize a state rule from the preemptive effect of a federal statute by characterizing the rule as procedural: where state law is inconsistent with congressional purpose, the state law must yield to the federal statute regardless of whether the state rule has a procedural purpose as well.[26]

Pennsylvania's Rule 238 undeniably conflicts with the federal rule under the FELA barring recovery of prejudgment interest. This rule is a substantive and long-standing part of the federal law of the FELA. The Pennsylvania courts cannot, in the name of "procedure," undermine the balance of equities enacted by Congress in the FELA and specifically recognized by the courts over a period of eight decades.

II. The Question Presented by this Appeal Is of Great Importance to the Nationwide Administration of the FELA

A. The Decision Below Is in Conflict with the Decisions of Other State and Federal Courts

A fundamental purpose of the FELA was to assure nationwide uniformity in interstate carriers' responsibilities to their employees: "This Court has long recognized that the FELA 'has a uniform operation, and neither is nor can be deflected therefrom by local statutes.'"[27] The

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[26] *See Brown v. Western Ry.*, 338 U.S. 294 (1949); Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 Ohio St. L.J. 384 (1956).

[27] *Burnett v. New York Central R.R.*, 380 U.S. 424, 433 (1965) (quoting *Panama R.R. v. Johnson*, 264 U.S. 375, 392 (1924)); *accord South Buffalo Ry. v. Ahern*, 344 U.S. 367, 371-72 (1953); *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943); *New York Central & H. R.R. v. Tonsellito*, 244 U.S. 360, 362 (1917).

decision below, however, portends a patchwork of conflicting results between FELA actions brought in various state and federal courts.

As noted previously, the courts of at least six other states have already rejected the suggestion that state procedural rules should be followed with regard to prejudgment interest in FELA actions. *See* cases cited *supra* at note 24. Some of these states are contiguous to Pennsylvania, thereby heightening the incongruity of the conflict and the potential for forum shopping.

Moreover, in Pennsylvania itself the results of FELA cases differ depending solely on whether they are filed in federal or state courts. In the decision below, and in *Humphries v. Pittsburgh & Lake Erie R.R.*, 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert. denied*, 106 S. Ct. 179 (1985), the state courts of Pennsylvania have applied Rule 238 to add prejudgment interest to FELA judgments. By contrast, two federal district courts in Pennsylvania have determined that prejudgment interest may not be awarded in actions brought under the FELA.[28] The conflict in Pennsylvania is not likely to be resolved by actions of the involved courts, which have already declined to follow each other's decisions.[29] Other intrastate conflicts of this kind are foreseeable.[30]

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[28] *Carver*, 600 F. Supp. at 127; *Camplese*, 594 F. Supp. at 47.

[29] In *Carver*, 600 F. Supp. at 127, the court specifically recognized, but refused to apply, the state court's contrary holding in *Humphries*. Furthermore, the court below was apprised of the decisions of the two federal district courts in Pennsylvania, *see, e.g.*, Brief *Amici Curiae* of the AAR and the National Association of Railroad Trial Counsel, *supra* n.4, at 17, but chose nevertheless to apply the state's own prejudgment interest rule.

[30] For example, in the past year, the Supreme Court of Montana has adopted the reasoning of the Pennsylvania courts, but has

These interstate and intrastate conflicts not only undermine the statutory goal of fairness and uniformity, but also increase the potential for unhealthy forum shopping. This problem is particularly serious because all FELA plaintiffs have the option to bring their claims in state courts, 45 U.S.C. § 56 (1982), and the statute offers defendant railroads no opportunity to remove claims against them to federal court. 28 U.S.C. § 1445(a) (1973). In addition, the FELA enables each plaintiff to file suit in any state where the defendant railroad does business, 45 U.S.C. § 56 (1982), and most railroads "do business" across a wide number of states. Thus, plaintiffs can easily select a forum where prejudgment interest is available. For example, as a practical matter an employee of any of the railroads serving the Northeast corridor, even if resident in New York or New Jersey or another state denying prejudgment interest, has the option

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declined to award prejudgment interest in FELA actions solely because the state law of Montana allows interest only from date of judgment. *Plouffe v. Burlington Northern, Inc.*, 730 P.2d 1148, 1156 (Mont. 1986); *Callihan v. Burlington Northern, Inc.*, 201 Mont. 350, 654 P.2d 972, 977 (1982). Should the Montana courts or the state legislature alter this rule, the clear implication of these decisions is that prejdugment interest will be available in Montana state court FELA actions. Such a result would conflict with the result obtainable in the federal courts of the same state. *See Chicago, M., St. P. & P. R.R. v. Busby*, 41 F.2d 617, 619 (9th Cir. 1930).

Until recently, trial courts in Texas had awarded prejudgment interest despite a contrary federal rule in that Circuit. *Compare, e.g., Lopez v. Missouri-Kansas-Texas Railroad Co.*, No. 84-46993 (164th Jud. Dist. Ct. Tex. Mar. 30, 1987), *with Lindsey v. Louisville & Nashville R.R.*, 775 F.2d 1322, 1325 (5th Cir. 1985). The Texas Court of Appeals has recently held, however, that prejudgment interest is not available in FELA cases in that state. *See Carmouche v. Southern Pacific Transp.*, No. 01-86-0083-CV (Tex. Ct. App. May 21, 1987) (attached for convenience at Appendix B).

of suing in state court in Pennsylvania.[31] Particularly where some years have already passed prior to the filing of the suit, the potential for prejudgment interest may not be an unimportant consideration.

In sum, the decision below threatens to undermine a major goal of the FELA—the replacement of disparate state legislation concerning on-the-job injuries of railroad employees with a nationwide, uniform system of remedies.[32] While conflicts with respect to federal law are always undesirable, the specific purpose of the FELA, the unique jurisdictional provisions of that statute, and the interstate character of the railroad industry make resolution of this controversy particularly important.

B. The Question of Prejudgment Interest in FELA Actions is of Great Economic Importance to the Nation's Railroads

This case also has important practical consequences. The number of FELA cases filed each year is immense: the AAR has estimated that approximately one thousand FELA actions are brought annually in state courts, and federal statistics show that, in 1986, more than 2,000 FELA claims were filed in the federal courts—an increase of eighteen percent over the previous year.[33] All of these cases involve claims for damages—the sole remedy available under the FELA. Because at least thirty other states have prejudgment interest rules, a very large

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[31] The forty-five railroads that "do business" in Pennsylvania collectively operate in 19 states spread across the eastern half of the United States. *See* Rand McNally, *supra* note 7.

[32] *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 371 (1953); *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942).

[33] *See* Annual Report of the Director of the Administrative Office of the United States Courts at Table C2 (1986).

number of FELA cases will raise the issue presented here.[34]

That issue will have real financial importance. The amount of prejudgment interest awarded by the court below ($26,000) is not large, but it represents a significant proportion of the total judgment, approximately twenty percent. To the extent that the decision below is followed by the courts of other states with prejudgment interest rules, it could have a serious financial impact on the nation's railroads. Given the $580 million in total claims paid annually by the railroads, even a limited additional percentage in prejudgment interest could have substantial consequences.

Moreover, the amount of a prejudgment interest award can grow exponentially as a result of factors entirely beyond the control of the defendant railroad. In Texas, for example, prejudgment interest begins to run six months after the injury, *see Cavnar v. Quality Control*

[34] *See* Alaska Stat. § 45.45.010 (1980); Cal. Civ. Code §§ 3288, 3291 (Supp. 1985); Col. Rev. Stat. §§ 5-12-102, 13-21-101 (Supp. 1986); Conn. Gen. Stat. Ann. §§ 37-3, 52-192, -194, -195 (Supp. 1986); Ga. Code Ann. § 51-12-14 (1982); Haw. Rev. Stat. §§ 478-1, 636-6 (Supp. 1984); Iowa Code Ann. § 535.2 (West Supp. 1985); La. Rev. Stat. Ann. § 13:4203 (West Supp. 1985); Me. Rev. Stat. Ann. tit. 14, § 1602 (Supp. 1985); Mass. Ann. Laws ch. 107, § 3, ch. 229, § 11, ch. 231, § 6B (Lawyers' Coop. Supp. 1985); Mich. Comp. Laws Ann. § 600.6013 (West Supp. 1985); Minn. Stat. Ann. §§ 334.01, 549.09 (West Supp. 1987); Mont. Code Ann. § 27-1-210 (Supp. 1985); Nev. Rev. Stat. §§ 17.15, 17.130(2) (1979); N.H. Rev. Stat. Ann. §§ 336:1, 524:1-b (Supp. 1985); N.J. Civ. Prac. R. 4:42-11(b) (1985); N.M. Stat. Ann. §§ 56-8-3, 56-8-4 (Supp. 1985); N.Y. [Est. Powers & Trusts] Law § 5-4.3 (Consol. Supp. 1986); N.C. Gen. Stat. §§ 24-1, 24-5 (Supp. 1985); N.D. Cent. Code Ann. § 32-03-05 (Supp. 1985); Ohio Rev. Code Ann. § 1343.03 (Supp. 1985); Okla. Stat. Ann. tit. 12 § 727(A)(2) (Supp. 1985); Pa. R. Civ. P. 238 (1985); R.I. Gen. Laws § 9-21-10 (Supp. 1985); S.D. Codified Laws Ann. § 21-1-13 (1979); Tenn. Code Ann. § 47-14-123 (1984); Tex. Rev. Civ. Stat. Ann., art. 5069-1.03, -1.05 (Vernon 1985); Utah Code Ann. §§ 15-1-1, 78-27-44 (1977); Va. Code Ann. § 8.01-382 (1983); W. Va. Code § 56-6-31 (Supp. 1985); Wis. Stat. Ann. § 807.01 (West Supp. 1986).

Parking, 696 S.W.2d 549 (Tex. 1985), and there is a three year statute of limitations under the FELA. Thus, were prejudgment interest available in Texas, a plaintiff's FELA recovery could increase substantially merely because he delayed filing his FELA claim until the end of the limitation period.[35] Because no corresponding compensation is available to defendants, such large prejudgment interest awards would upset significantly the balance of equities Congress struck in the FELA, and would have a serious financial impact on the nation's railroads.[36]

CONCLUSION

For the foregoing reasons, the decision below merits plenary review and reversal by this Court.

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[35] Indeed, this prospect arose in a recent Texas case, in which the Texas Court of Appeals considered a claim for over $116,000 in prejudgment interest. However, applying federal law, the Texas court refused to award the prejudgment interest. *See Carmouche*, *supra* note 30.

[36] The decision below could have even more widespread consequences. As noted earlier, precedent under the FELA applies to cases brought by seamen under the Jones Act. *See Kernan*, *supra* note 23. Thus, the problems of conflicting rules on prejudgment interest will affect the thousands of cases filed annually under the Jones Act as well. *See* Annual Report, *supra* note 33.

APPENDICES

APPENDIX A

ASSOCIATION OF AMERICAN RAILROADS

Full Membership

Alton & Southern Railway
Atchison, Topeka & Santa Fe Railway Company

Bangor & Aroostook Railroad Company
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Burlington Northern Railroad Company

Cambria & Indiana Railroad Company
Canadian National—Line in U.S.
Canadian Pacific—Lines in U.S.
Chicago Illinois Midland Railway Company
Chicago & North Western Transportation Company
Consolidated Rail Corporation
CSX Corporation

Detroit & Mackinac Railway Company
Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway

Galveston, Houston & Henderson Railroad
Grand Trunk Western Railroad
Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company

Illinois Central Gulf Railroad

Kansas City Southern Railway

Lake Terminal Railroad Company (The)
Louisiana & Arkansas Railway Company

Manufacturers Railway Company
McCloud River Railroad Company
McKeesport Connecting Railway Company

Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company

National Railroad Passenger Corporation
Norfolk & Western Railway Company

Pittsburgh & Lake Erie Railroad Company
Peoria & Pekin Union Railway
Pittsburgh & Shawmut Railroad Company
Prescott & Northwestern Railroad Company

Richmond, Fredericksburgh & Potomac Railroad Company

St. Louis-Southwestern Railway Lines
Seaboard System Railroad Incorporated
Soo Line Railroad Company
Southern Pacific Transportation
Southern Railway Company

Texas Mexican Railway Company

Union Pacific Railroad Company
Union Railroad Company of Pittsburgh

Vermont Railway Incorporated

Western Pacific Railroad Company
Winston-Salem Southbound

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Atlanta, St. Andrews Bay Railway Company

Belfast & Moosehead Lake Railroad Company

California Western Railroad
Central Western Railway Corporation
Centromen Puru Incorporated
Chicago, Central, and Pacific Railroad Company
Chicago Missouri & Western Railway
Chicago South Shore & South Bend Railroad

Chicago Rail Link
Cities Services Company Railroad
Colorado & Wyoming Railway Company

Dardanelle & Russellville Railroad Company
Delray Connecting Railroad Company

East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East St. Louis Junction Railroad Company
East Texas Transportation Incorporated

French National Railroads
Fruit Growers Express Company

Genesee & Wyoming Railroad Company
Government of Canada
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company

Hamersely Iron Pty. LTD (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.

India, Gov't of: Ministry of Railways (INDIA)

Japanese National Railway (JAPAN)

Lake Superior & Ishpeming Railroad
Lenawee County Railroad Company, Incorporated
Louisiana & Delta Railroad
Louisiana & North West Railroad Company

Manufacturer's Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
MidSouth Rail Corporation
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company

New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation

Pacific Fruit Express Company
Paducah & Louisville Railway, Incorporated
Pickens Railroad—National Railway Utilization Corporation
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)

Roberval & Saquenay Railway Company (CANADA)

Sierra Railroad Company (CALIFORNIA)
South African Railways (REPUBLIC OF SOUTH AFRICA)
Southern Indiana Railway, Inc.
Spanish National Railway (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)
Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A Minas Railway (BRAZIL)

Wabush Lake Railway LTD (CANADA)
Washington Terminal Company

SPECIAL CANADIAN AND MEXICAN MEMBERS

Canadian Lines (In Canada)

Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
White Pass & Yukon Corporation LTD
VIA Rail Canada

Mexican Lines (In Mexico)

Chihuahua Pacific Railway Company
[Direccion General; de Ferrocarriles en Operacion]:

Ferrocarril Sonara-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.

Ferrocarril del Pacifico, S.A. de C.V. National Railways of Mexico

APPENDIX B

OPINION

IN THE COURT OF APPEALS FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

No. 01-86-0883-CV

JAMES M. CARMOUCHE,
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION CO.,
Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 81-22697

This is an appeal from a judgment in which the jury found that the appellee was negligent under the Federal Employers' Liability Act, 45 U.S.C. secs. 51-59 (1981) (hereafter F.E.L.A.), and awarded the appellant $722,-500.00, of which $203,032.71 represents past damages. Since the jury also found that the appellant was 30% negligent, the damages awarded were accordingly reduced by the trial court to $520,122.89, of which $142,122.89 represents past damages.

Appellant's sole point of error contends that the trial court erred in failing to award him prejudgment interest

on the $142,122.89 in past damages. Although appellant concedes that the law is well established in the Fifth Circuit that prejudgment interest is not granted in F.E.L.A. cases, he claims that he is entitled to prejudgment interest based on the recent Texas Supreme Court decision in *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985).

In *Cavnar*, the Texas Supreme Court held that as a matter of law, prevailing plaintiff may recover prejudgment interest in a wrongful death and survival action. However, the instant case was brought under federal law, and not under state law.

In a suit arising under F.E.L.A., federal law, not state law, determines the availability of prejudgment interest, regardless of whether the action is pending in state court. *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847, 849 (5th Cir. 1944). Questions concerning the measure of damages in an F.E.L.A. suit are federal in character. *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 (1980). Accordingly, we conclude that the law pronounced in the *Cavnar* decision is not applicable.

The United States circuit courts, including the Fifth Circuit, have consistently refused to award prejudgment interest in F.E.L.A. cases. *See Lindsey v. Louisiana & Nashville Ry.*, 775 F.2d 1322 (5th Cir.1985); *Wilson v. Burlington Northern Ry.*, 803 F.2d 563 (10th Cir. 1986); *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971); *Chicago, Milwaukee, St. Paul & P. Ry. v. Busby*, 41 F.2d 617 (9th Cir. 1930).

Although a federal district court in Colorado awarded prejudgment interest in a F.E.L.A. case, the Tenth Circuit subsequently held in *Wilson*, 803 F.2d at 563, that such recovery was barred. Two state courts in Pennsylvania have also awarded prejudgment interest in F.E.L.A. cases, *see Morgan v. Monnessen Southwestern Ry.*, —— Pa. Super. ——, 518 A.2d 1171 (1984) [sic, 1986] and

Humphries v. Pittsburgh & Lake Erie Ry., 328 Pa. Super. 119, 476 A.2d 919 (1984), but the Pennsylvania federal courts have denied recovery of prejudgment interest. *See Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125 (E.D. Pa. 1984); *Camplese v. Consolidated Rail Corp.*, 594 F.Supp. 44 (M.D. Pa. 1984).

We conclude that, because federal law is applicable to F.E.L.A. cases, the trial court properly refused to award the appellant prejudgment interest on his damages.

The appellant's point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Jack Smith
JACK SMITH,
Justice

Justices Duggan and Cohen also sitting.

Publish. Tex. R. App. P. 90

Judgment rendered and opinion delivered 21 May 1987.
True copy attest:

Kathryn Cox
KATHRYN COX
Clerk of the Court

JOINT

APPENDIX

(10)

Supreme Court, U.S.
FILED
NOV 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1743

IN THE

Supreme Court of the United States

October Term, 1986

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JOINT APPENDIX

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80 PP

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APPENDIX A

Relevant Docket Entries

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Civil Division

Commonwealth of Pennsylvania)
) SS:
County of Allegheny)

No. GD 79-23765.

GERALD G. MORGAN,

Plaintiff.

v.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, A CORPORATION,

Defendant.

RELEVANT DOCKET ENTRIES

9/6/79 Complaint in Trespass filed.

9/26/79 Defendant's Answer filed.

12/4/81 Verdict in favor of plaintiff in the amount of $125,000.00 (Finkelhor, J).

12/7/81 Requested Points for Charge of Defendant Monessen Southwestern Railway Company filed.

Appendix A—Relevant Docket Entries.

12/14/81 Motion of the Monessen Southwestern Railway Company for Judgment Non Obstante Verdict filed.

12/14/81 Motion of the Monessen Southwestern Railway Company for a New Trial Filed.

12/15/81 Order of December 15, 1981 (Finkelhor, J.) molding verdict of the jury entered in this action on December 4, 1981, by adding the sum of $26,712.50 as damages for delay at 10% per annum. The total verdict is $151,712.50. Eodie, exceptions noted to defendant.

7/26/82 Opinion and Order of Court of July 22, 1982 (Finkelhor, J. and Del Sole, C.J.) dismissing defendant's post trial motions. Judgment to be entered in the favor of plaintiff in the amount of $125,000 (plus delay damages under Rule 238) upon payment of verdict fee.

7/27/82 Praecipe for Judgment filed. Judgment entered in favor of plaintiff in the amount of $151,712.50.

7/30/82 Notice of Appeal of Monessen Southwestern Railway Company filed.

8/10/82 Amended Notice of Appeal of Monessen Southwestern Railway Company filed.

IN THE SUPERIOR COURT OF PENNSYLVANIA

Gerald L. Morgan, Appellee v. Monessen
Southwestern Railway Co., Appellant
No. 849, Pittsburgh, 1982

3/8/85 Order and Opinion filed.

Appendix A—Relevant Docket Entries.

IN THE SUPREME COURT OF PENNSYLVANIA

Monessen Southwestern Railway Company
Appellant v. Gerald L. Morgan, Appellee
No. 63 W.D. Appeal Docket 1985

4/8/85 Petition for Allowance of Appeal filed by Monessen Southwestern Railway Company.

8/29/85 Order granting Petition for Allowance of Appeal filed.

12/12/86 Judgment and Opinions of the Supreme Court of Pennsylvania filed.

2/27/87 Notice of Appeal of Monessen Southwestern Railway Company filed.

APPENDIX B

Complaint

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY,
PENNSYLVANIA
CIVIL DIVISION

APPEARANCE DOCKET
G.D. NO. GD79-23765
IN TRESPASS

GERALD L. MORGAN,
Plaintiff,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation,
Defendant.

NOTICE TO DEFEND

To: MONESSEN SOUTHWESTERN RAILWAY COMPANY, DEFENDANT

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you

fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff(s). You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Lawyer Referral Service
The Allegheny County Bar Association
920 City-County Building
Pittsburgh, Pennsylvania 15219
Telephone: 412/261-0518

EVANS, IVORY & EVANS
THOMAS HOLLANDER
Attorneys for Plaintiff(s)

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

APPEARANCE DOCKET
G.D. No. GD79-23765
In Trespass

GERALD L. MORGAN,

Plaintiff.

vs.

MONESSEN SOUTHWESTERN RAILWAY
COMPANY, A corporation,

Defendant.

COMPLAINT

GERALD L. MORGAN, plaintiff, brings this suit in trespass against MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation, defendant, to recover damages upon a cause of action whereof the following is a statement:

1. The plaintiff is a resident of Perry Township, Fayette County, Pennsylvania.

2. This action arises under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, 66, as amended, U.S.C. Title 45, §51, *et seq.*, as hereinafter more fully appears.

3. Defendant is a corporation and is doing business in Allegheny County, and during all the times herein mentioned, was a common carrier by railroad engaged in interstate commerce and in connection therewith was in possession and control of its number 3 scale track and number 5 scale track at the Monessen Plant of Wheeling-Pittsburgh Steel Corporation and had the duty to inspect, maintain and clean the walkways adjacent to the said tracks.

4. At the time of the occurrence here involved, plaintiff was employed by defendant as a trainman and was engaged in the course of his employment, and all or part of his duties were in furtherance of interstate commerce and directly or closely and substantially affected such commerce.

[-2] 5. On August 27, 1977, as plaintiff descended from a moving railroad car in order to carry out his employment duties, he was caused to fall and severely injure himself due to the negligence of the defendant railroad, when his foot came in contact with loose, round iron ore pellets on the surface of the walkway.

6. The injuries and damages hereinafter set forth were the result of the negligence of the defendant railroad, in whole or in part, generally and in the following particulars:

(a) In causing or permitting the iron ore pellets to be and remain on the surface of the walkway here involved.

(b) In failing to remove the iron ore pellets from the surface of the walkway here involved.

(c) In failing to properly inspect, maintain, and clean the walkway here involved.

(d) In failing to provide the plaintiff with a safe place to work.

(e) In failing to inspect, maintain and clean the walkway here involved.

(f) In otherwise failing to exercise that regard and care for the rights and safety of the plaintiff required of the defendant under the law.

7. Plaintiff suffered injuries to his neck and low back and shock and injuries to his nerves and nervous system, some or all of the results of which injuries may be permanent, and by reason thereof has sustained and will sustain physical and mental pain, inconvenience, humiliation, loss of earnings and impairment of earning power, and has incurred and will incur expenses for medical attendance, hospitalization, medicines, surgical appliances and nursing care.

WHEREFORE, plaintiff demands judgment of the defendant in a sum in excess of Ten Thousand Dollars.

A JURY TRIAL IS DEMANDED.

EVANS, IVORY & EVANS
THOMAS HOLLANDER
Attorneys for Plaintiff

Commonwealth of Pennsylvania)
) SS.
County of Allegheny)

Before me, the undersigned authority, a notary public, in and for said County and Commonwealth, personally appeared GERALD L. MORGAN, who being duly sworn according to law, doth depose and say that the facts set forth in the foregoing Complaint are true and correct to the best of his information, knowledge and belief.

GERALD L. MORGAN
Gerald L. Morgan

Sworn to and subscribed
before me this 31
day of Aug 1979

ANDREW (Illegible)
Notary Public

APPENDIX C

Excerpts from Transcript

• • •

[310] DELBERT SCHUSTER, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOLLANDER:

Q. Tell us your name, please. A. Delbert Schuster.

Q. Is the address that I just read into the record your present address? A. No. You had them reversed.

Q. The addresses are reversed? A. Yes.

Q. So that when the railroad had you at R. D. 4 Belle Vernon, they should have had you where? A. 692 Maple Drive.

MR. REIF: We will stipulate that the typographical error was made, Your Honor.

MR. HOLLANDER: All right.

BY MR. HOLLANDER:

Q. What is your occupation, sir? A. I am a brakeman.

Q. I gather you work for the Monessen Southwestern Railway Company. A. Yes.

[311] Q. What was the date you were hired? A. March 17, 1964.

Q. You have worked as a brakeman or as a conductor from that time to the present time. A. Yes.

Q. Do you know Gerald Morgan? A. Yes.

Q. Do you agree with his information, as far as the rest of it is concerned, answer, that you were on the roster, seniority roster of this railroad, at a position just above Mr. Morgan? A. Yes.

Q. That he then was the next brakeman or trainman hired after you were hired. A. Right.

Q. And that apparently Mr. McKosky was then the next one hired after Mr. Morgan. A. Yes.

Q. It is probably clear to everybody here; but just so it is, if there is any confusion, that, apparently, determines the right to work as far as what work is available and the length of service of the employee; is that right? A. Yes.

Q. So that depending on the amount of work, the [312] older employees get to fill up those jobs when those jobs are available; and the ones below that don't work. A. Yes.

Q. We have all of the exhibits in front of you. Do you know what these are, by the way? Do you know what this is, these things that are taken out of a bag that is marked Exhibit 2? A. Yes. They look like iron ore pellets.

Q. Incidentally, in the course of your work, have you ever worked down in the area of the No. 3 and No. 2 Scale Tracks? A. Yes.

Q. Do you find those ore pellets there? A. Yes.

Q. Other debris there? A. Yes.

Q. When you have worked in that area, has it affected your footing?

MR. REIF: I thought Mr. Hollander rested on that portion of the case. I don't see how this pertains to the damage aspect.

MR. HOLLANDER: I will withdraw the question, Your Honor.

BY MR. HOLLANDER:

[313] Q. Was a subpoena served upon you, Mr. Schuster, to come to court to give information regarding your earnings from the Monessen Southwestern Railway Company for the years 1977 through to the present time? A. Yes.

Q. Did you look into your records to determine what those earnings were? A. Yes.

Q. Before I ask you to tell us about that, have you been working with any regularity as a trainman since 1977? A. Yes, except until now. We are laid off now on account of a plant shutdown.

Q. You were laid off since when? A. Well, this is my third week.

Q. Have you been laid off at any other time prior to this particular layoff? A. I was off a month last—a week last month; and, then, I think, in last year I was off one week.

Q. So that since 1977, during that period of time from 1977 to the present time, you are off a week last year and what appears to be a total of, to date, four weeks. [314] A. Yes.

Q. Are you scheduled to return to work? A. Tentatively next week.

Q. Otherwise you have worked as a trainman on a regular basis during that entire period of time. A. Yes.

Q. Do you know, because of the seniority position of Mr. Morgan, whether he would have been able to work as a railroad trainman on a regular basis during that same period of time? A. I imagine, works right below me.

Q. What were your earnings from the Monessen Southwestern Railway Company for the calendar year 1977? A. 1977, $23,703.97.

Q. Can you give us that information for the year 1978.

MR. REIF: I am sorry. Could we simply have the witness repeat that figure.

THE WITNESS: $23,703.97.

BY MR. HOLLANDER:

Q. And for the year 1978. A. $25,079.46.

Q. And for 1979. [315] A. $38,109.09.

Q. And 1980. A. $29,253.09.

Q. Do you have information that shows the amount of your total earnings for this year, up to the last time you were paid? A. Yes. It is—

Q. What period of time would that cover, as of what date? A. November 21, 1981.

Q. What were your earnings for 1981 as of that date? A. $32,881.30.

MR. HOLLANDER: Thank you. You may cross-examine.

CROSS-EXAMINATION

BY MR. REIF:

Q. Mr. Schuster, when you were asked by Mr.. Hollander to provide that wage information, what records did you bring with you that contain this earning information? A. My W-2.

Q. Do you have those for 1977, 1978, 1979, and 1980? [316] A. Yes, all but one year. I don't—I couldn't find it. I just brought my last statement in 1978.

Q. May I look at those for a moment. A. Yes.

Q. Now, the first year that you mentioned was 1977; and I am sure the figures that you gave were your gross earnings for that year; is that not correct? A. Yes.

Q. By referring to your W-2 Form, which you have there for 1977, can you tell me what your net earnings were in 1977?

MR. HOLLANDER: Your Honor, at this time I would interject an objection based on the Supreme Court decision in a Norfolk and Western Company case which makes this inquiry improper.

THE COURT: Do you want to come to side bar, please.

(At side bar.)

THE COURT: This was the Court's understanding.

MR. HOLLANDER: Clearly, under any interpretation of this decision, this question is improper.

[317] THE COURT: Well, it would get us into his taxes, which is a questionable area.

(Mr. Eric P. Reif argued to the Court on behalf of the Defendant.)

(Mr. Thomas Hollander argued to the Court on behalf of the Plaintiff.)

THE COURT: Now, the Court is going to make two prerequisites: No. 1 is that we would feel that you could not get into his net without laying some foundation as to character of his family, et cetera; and I also, you know, wanted to call to your attention that while this might be appropriate in terms of the plaintiff, introducing his earnings, himself, this is not the plaintiff. This is some other person.

What it really goes to is whether or not deductions made on this man has any relevance as to the plaintiff; so that I don't think that the foundation has been laid for the cross-examination.

The second thing is that we are going to sustain Mr. Hollander's objection in that we agree that it isn't the W-2 itself; but it would be the actual total deductions that were made over a year's period.

MR. REIF: Sure.

[318] THE COURT: In other words, it is not actual tax paid, which is different than the deductions; so that we are going to direct you to lay a foundation.

MR. REIF: I will be happy to do that.

THE COURT: We will determine then whether or not the question is appropriate.

BY MR. REIF:

Q. Mr. Schuster, are you married? A. Yes, I am.

Q. Do you, other than your wife, do you have any dependents? A. I have three children.

Q. Are they dependents? A. Yes, they are.

Q. What are their ages? A. Fifteen, thirteen, and ten.

Q. Would it be true to say then that on your tax returns, you list yourself as a deduction, your wife as a deduction, and your three children. A. No.

MR. HOLLANDER: For the purpose of preserving the consistency of my objection before, which you ruled on, I will object for the additional reason as cited, and move to strike the question, too.

[319] BY MR. REIF:

Q. You may answer the question. A. What is the question?

MR. REIF: Could you read it back, please.

(The last question was then read back by the reporter.)

The Witness: No. I only claim two.

BY MR. REIF:

Q. You claim only two. Yourself— A. During the year, I only claim two.

Q. Yourself and your wife? A. And my wife.

Q. Now—

MR. HOLLANDER: I think there is confusion. I think he is referring to withholding as opposed to ultimate taxes.

THE COURT: Well, I think the witness answered the question; and on redirect you can certainly go into that.

MR. HOLLANDER: I am sorry, sure.

BY MR. REIF:

Q. Do you understand the question, sir? A. On my income tax, I withhold two during the year; and, then, when I fill out my income tax at [320] the end of the year, I claim five.

Q. Okay. A. For the additional money. I used to pay additional taxes. I have to pay wage taxes and what have you.

Q. Let me clarify that then: For withholding purposes, with regard to your pay from the railroad, you list only yourself and your wife. A. Yes.

Q. Now, the figures that you have given for each of these years represent gross income. A. Yes.

Q. Do they not? A. Yes.

Q. With the withholding that you have listed for you and your wife, have you done that for each of these years? A. No. They didn't ask me that. The only thing they asked me to bring were my W-2's.

Q. No, no. I am asking you about the amount that you have requested be withheld from your pay for you and your wife by the railroad—

MR. HOLLANDER: That is irrelevant to the issue of Mr. Morgan's claim in this case. I object to the question.

[321] THE COURT: I will sustain it. You will recall that the Court indicated that it was total tax that was relevant. It would be the total tax responsibility.

BY MR. REIF:

Q. Then let me ask it this way, Your Honor: In 1977, your gross earnings were $23,703.97. Do you know what your total tax was in that year?

MR. HOLLANDER: I will object to this question, first of all, as not being relevant; secondly, not being shown on the W-2 Form in any way. It is not relevant.

MR. REIF: Your Honor, I think it is relevant. I want to know how many deductions this man claims. We can develop from Mr. Morgan how many deductions he claims.

The ladies and gentlemen of the jury pay income tax. They are familiar with that procedure.

MR. HOLLANDER: I would wish to approach the bench.

THE COURT: Well, I think what we are going to do is: We have reached a legal question here which the Court is going to have to rule on. We would like to have a full argument. We are going [322] to ask the witness to step down from the witness stand, and we are going to recess the jury for five minutes so that the Court can hear extended argument on this issue.

You may step down.

All right, do you want to come to side bar, please.

(Off the record discussion.)

THE COURT: We are going to rule, Mr. Reif, and as we have already stated on the record, we agree with you that this case is governed by the Norfolk & Western Railroad case of 100 Supreme Court Reporter, 755 decided in 1980; and there is no question in the Court's mind that based on that decision you may ask questions vis-a-vis, the

plaintiff as to tax liability and also, under this case, it seems that the Court would have to charge the jury that the moneys that were received are not subject to income tax liability.

Now—

MR. REIF: I am sorry. The case also holds that the jury, not just that the jury be instructed that the award is not subject to income tax, but also in arriving at their award, they are [323] to consider, when we are talking about lost earnings, the income tax affect.

MR. HOLLANDER: They are not to consider? I think the admonition is in the negative. If you read the Liepelt decision—

THE COURT: That is further down the road. I am sure that is in one of your points for charge.

MR. REIF: That's right.

THE COURT: So that we are affirming your right to use the Norfolk case; and in terms of the plaintiff, now, what has arisen here is examination not of the plaintiff of his tax liability but the cross-examination of a comparable witness; and we feel that you are entitled to ask him: Did you pay income taxes on your earnings?

MR. HOLLANDER: That is not relevant, Your Honor. What if he didn't? What is the difference? He has liability whether he paid them or not. I hate to see him—

THE COURT: All right. But, I think he can establish that the man paid taxes. Beyond that, we are going to sustain the plaintiff's objection as to the amount of these taxes, the method of the

calculation because it seems to me that [324] we are opening up a minute examination of this man's tax liability which does not seem to me to have any real relevance to the plaintiff's loss of earnings.

Now, we want to caution plaintiff that in making this ruling and not permitting Mr. Reif to examine him on the minute aspect of his tax liability, when you go to make your argument to the jury of comparable wages, your comparables are going to have to be gross. Do you understand that?

MR. HOLLANDER: Yes. I don't believe it is possible to show comparable nets with any degree of relevance.

THE COURT: But the Court is ruling that based upon the positions that have been taken here that the comparables are comparable grosses and not comparable nets.

MR. HOLLANDER: I understand that.

THE COURT: So that is clear on the record.

MR. HOLLANDER: So that it is in the record, I will say now that I object. I do want an objection to the question the defendant lawyer has been permitted to ask of this witness, whether [325] he paid taxes. I don't think that has anything to do with the case, and I don't think it should be asked.

MR. REIF: I would not propose to ask—

THE COURT: You have already, in a way, established it. The witness has already stated that he has paid taxes.

MR. REIF: Am I permitted to ask him, to end this matter, simply the question that these amounts that you have given us are gross amounts for each year and do not include any deductions or any tax payments which were made?

MR. HOLLANDER: I object to it because it is repetitive. It has already been asked.

THE COURT: All right. We will permit you to ask that question, but we are not going to go into any figures of tax payment or any other kinds of deductions.

MR. REIF: I understand.

THE COURT: And the basis for the Court's reasoning is that it appears that we are getting completely out of relevancy as to this particular case.

MR. REIF: I want to note an exception on the record to that ruling.

[326] MR. HOLLANDER: Briefly at side bar, the Court is ruling that the issue then of the tax liability of the plaintiff is a matter for evidence in this case and for the jury's consideration?

THE COURT: That's right.

MR. HOLLANDER: I except to that.

THE COURT: But not of this witness.

MR. HOLLANDER: I except to that and indicate that since that is the issue, we will have to deal with it as a part of the proof in the case; and having that parameter, I don't want my behavior, introducing evidence regarding that, to be construed as an acceptance of that issue which I would like to preserve for appeal. Is that all right?

THE COURT: Yes.

MR. REIF: As I understand the ruling, Your Honor, then through my people, when I go into the questioning of Mr. Morgan's earnings, I am entitled to develop what his tax liability has been.

THE COURT: You are entitled to get into what his net earnings were.

MR. REIF: Right.

[327] THE COURT: Right.

MR. HOLLANDER: I am anticipating the same kind of problem now because his people will only have withholding information, which is not relevant. He needs other evidence than that. Withholding alone, which is all the defendant employer would know about, unless they looked at his actual tax situation, so I am afraid we are in the same boat there.

THE COURT: Well, we have ruled as to this case. It seems to me that under this case, let me look at it again, it seems to me under this case—

MR. REIF: There are other cases, incidentally.

THE COURT: Do you have them?

MR. REIF: I don't have them with me, but I have them on the tax question.

THE COURT: That they found that the Court errored in refusing to permit testimony on this issue and said the wage earner's income tax is a relevant factor in calculating monitary loss suffered by his dependents.

MR. HOLLANDER: By his dependents. That is the position I take.

[328] THE COURT: All right, well—

MR. REIF: Your position is that that is only applicable to wrongful death situations.

MR. HOLLANDER: That is the only kind of case that it would apply, to go into that issue because it was what the dependents would expect in a claim that is limited to pecuniary loss.

THE COURT: Are we finished then? We will take a recess ourselves.

(End of side bar conference.)

(Recess taken.)

BY MR. REIF:

Q. Mr. Schuster, are the amounts that you have given us for the years 1977, through 1981, through the period of November 21, 1981, your gross earnings from the railroad in each of those years? A. Yes.

Q. Those figures do not take into account, do they, any Federal or State Income Tax that you paid on those earnings in any given year. A. No.

Q. With regard to your figures for this year to date or through, I am sorry, November 21, 1981, $32,881.30, have you taken any vacation this year? [329] A. No.

Q. Does this include all of the amounts that you have received this year that normally would be vacation pay? A. Yes.

Q. How much would that represent, approximately? A. Four weeks, approximately. I don't know. Maybe about $1,800.

Q. You are not sure of the exact amount. A. No, I am not.

Q. I take it your earnings are based upon the hourly rates contained in the collective bargaining agreement between the United Transportation Union and the Monessen Southwestern Railway. A. Yes.

Q. In other words, the amount that you make depends on the number of hours you work in a given year multiplied by whatever the applicable hourly rate is. A. Yes.

Q. In a given year. A. Yes.

MR. REIF: Thank you. That is all I have.

* * *

[332] A. As conductor.

Q. The shift differential you referred to is a different amount paid depending on whether or not you would work on an afternoon shift or a night turn. A. Yes.

Q. And the bonus that you have referred to is what is known as an incentive. A. Yes.

Q. And that amount is determined upon the steel production that is achieved at the plant. A. Yes.

Q. That incentive is an amount that is received both by conductors and brakemen. A. Yes.

MR. REIF: Thank you. That is all I have.

DONALD McKOSKY, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOLLANDER:

Q. Would you tell us your name, please. A. Donald McKosky.

[333] Q. Where do you live, Mr. McKosky? A. R. D. 5, Box 251, Belle Vernon. The address is different, but it is the same place. They just changed the rural route number and box number.

Q. Where are you employed? A. I am a conductor with the Monessen Southwestern Railway.

Q. What was the date of your hire? A. 9 April, 1964.

Q. Do you understand that you were the next trainman hired after Mr. Morgan? A. Yes, sir.

Q. So you are immediately below him on that applicable roster; is that right? A. Yes, sir.

Q. Since 1977, have you been employed regularly on the railroad and had worked what you could do with the seniority that you had except for the times that Mr.

Schuster has told us about last year and this year where there was a week last year and about four weeks this year? A. Yes, sir.

Q. Have you missed work for any reason other than the furloughs? A. I was sick a few times. I had chest pains that [334] one time. I was in the hospital a couple different times, but not for a long length of time; and I really don't remember when. I think it was during that time.

Q. But your sickness was during times you could have otherwise been working had you not been ill; is that right? A. Yes, sir.

Q. Were you served a subpoena to come here to tell us what your gross earnings were from the railroad for the years 1977 through 1981 to date? A. Yes, sir.

Q. Can you tell us what those earnings were for the year 1977? A. $22,207.50 in 1977.

Q. And in 1978? A. $26,860.71.

Q. What about in 1979? A. $28,778.09.

Q. 1980? A. $28,104.09.

Q. And 1981, can you tell us what you have earned as of your last pay; and tell us what the date of that work was? A. $29,230.29. The date is 11/21/81.

[335] Q. As has been pointed out, those are your gross earnings from the railroad prior to any liability for Federal Tax; is that right? A. Yes.

MR. HOLLANDER: You may cross-examine.

CROSS-EXAMINATION

BY MR. REIF:

Q. Mr. McKosky, I note that although you, Mr. Morgan, and Mr. Schuster are aligned on the seniority roster, that your earnings and those of Mr. Schuster don't compare exactly.

Now, you mentioned that at one period of time you were out ill for some time. You don't remember exactly when. A. No. I know this morning my wife told me that I had. I missed work last year. I missed some work this year. I, you know, I really don't know as far as how much I did miss.

Q. Now, can you tell me why this year through November 21, 1981, you have earned $29,230; whereas, Mr. Schuster has earned $32,881? A. Well, probably one of the reasons would be: I took three weeks vacation this year; where, Mr. Schuster, I don't think he did.

[336] Q. So that is an option that you have as a railroad employee. A. We don't have compulsory vacation. You don't have to take the vacation if you don't want. It is a matter of personal choice.

Q. Aside from the question of whether or not you take vacation in any given year, are there other factors that can affect your earnings when you are working, depending on what jobs you bid on and other things? A. Normally if you work Sunday, it is a time-and-a-half day. You get half a day and a day of pay if you work Sunday. I do work Sundays, and I do work midnight.

The difference between midnight and afternoon is around $18 a shift differential.

I work the dumper job which isn't an overtime job.

Q. So the shift differential per day, depending on whether you work midnight or afternoon, would be roughly $18 per day. A. Per two-week period.

Q. Per two-week period, I am sorry; and you mentioned that there also is a premium pay if you work on Sundays. [337] A. Yes.

Q. You are paid-time and a half. A. Yes, sir. With our seniority, we have to go for the money. You don't have cost of living.

In other words, I try to work Sundays as much as I can rather than be off on Sundays.

Q. But that also is an option that you have. A. It is an option we have, yes, sir.

Q. You are not required to work Sundays. A. No, sir.

Q. And you can decide whether or not you want to exercise your seniority. A. If I can hold—if there is a job open that works Sunday. If there is not a job open that doesn't work Sunday—I have to take a job. If I couldn't hold a job that works Sunday, I have to take a job that doesn't work Sundays.

In other words, I wouldn't have a choice, just my seniority range. I do have the option to work Sunday, if I so desire.

Q. But those jobs are not always available. A. Not always.

MR. REIF: Thank you.

[338] REDIRECT EXAMINATION

BY MR. HOLLANDER:

Q. Someone got to work on Sunday. A. Yes.

Q. It is a question: If you can get that job, you will take it; is that right? A. Yes, sir.

Q. There has been talk about bumps that occur semiannually on your railroad which is the time that all jobs are opened up; and you can try to get the job you want. Is that right? A. Yes, sir.

Q. And you can get the job you want if you have more seniority than the next person. A. Yes, sir.

Q. You don't get it if you don't have that seniority. A. Right. Yes, sir.

Q. I take it from time to time all the trainmen work in various jobs, depending on who exercises their seniority prerogative. A. Yes, sir.

MR. HOLLANDER: That is all I have.

[339] RECROSS-EXAMINATION

BY MR. REIF:

Q. I have one other question: Mr. McKosky, are there employees on the railroad who have more seniority than you do, who don't work Sundays? A. Yes, sir.

MR. REIF: Thank you.

THE WITNESS: It is an option.

MR. HOLLANDER: At this time, I would like to offer into the record some additional interrogatories that were served upon the defendant, and I can read them. There are several.

THE COURT: Do you want to give him the numbers.

MR. HOLLANDER: Yes: 1, 2, 3, 4, 5A and B, 6, 9, 11, 14, and 18.

MR. REIF: I have no objection to any of those, Your Honor.

THE COURT: You may read them into the record. The jury may consider them as evidence.

MR. HOLLANDER: Thank you, Your Honor.

1. On what date was plaintiff first employed by defendant corporation?

ANSWER: April 1, 1964.

• • •

[344] or have performed tests upon him and have diagnosed his condition or have been in consultation concerning his condition since the accident?

ANSWER: Dr. W. Rongaus, Wheeling-Pittsburgh Steel, Monessen, Pennsylvania; Dr. M. J. Packovich, unknown; Dr. A. Chancgo, Wheeling-

Pittsburgh Steel, Monessen, Pennsylvania, Dr. T. W. Cowan, 7040 Jenkins Arcade, Pittsburgh, Pennsylvania; Dr. G. W. Gray, 1501 Locust Street, Pittsburgh, Pennsylvania; Dr. C. Simkovich, R. D. No. 3, Belle Vernon, Pennsylvania; Harmarville Rehabilitation Center, Guys Run Road, Pittsburgh, Pennsylvania.

56. Which of the doctors named in defendant's answers to interrogatories 8B, 17E, 19C, and 48 above, is or has been in the employ of defendant, either on a full-time, part-time, per case or consulting basis?

ANSWER: All.

54. Has plaintiff returned to duty for defendant since the accident?

ANSWER: Yes.

55. If the answer to Interrogatory 54 is yes, please state:

A. When he returned to duty.

ANSWER: February 5, 1979.

[345] B. The nature of the work he has done since his return to duty.

ANSWER: Radio and supply clerk at Locomotive Shop.

MR. REIF: Your Honor, that is not the entire answer.

MR. HOLLANDER: I agree. I offered A and B.

MR. REIF: I am sorry?

MR. HOLLANDER: That was the offer.

THE COURT: Are you objecting?

MR. REIF: You are offering only A and B.

MR. HOLLANDER: That is all I offered.

MR. REIF: Oh, all right.

MR. HOLLANDER: I would like to call Mr. Morgan again.

GERALD L. MORGAN, having been previously sworn, continued to testify as follows:

DIRECT EXAMINATION

BY MR. HOLLANDER:

Q. Mr. Morgan, when you testified, we asked you about how the accident occurred; and when we last

* * *

[367] A. No, it wasn't.

Q. Was there anybody on that job doing what you were asked to do prior to February 5, 1979? A. No. That particular job, no.

Q. Interrogatory answers by the railroad about that job describes it as a radio and supply clerk at the Locomotive Shop. Do you know the job by that title? A. Not exactly by that title.

Q. Does the job have a title? A. None that I know of, no.

Q. Where do you perform—when you were first put back to work in February of 1979, where were you placed? What location? A. At the roundhouse.

Q. Have you continued to work at the roundhouse since then? A. I have, yes.

Q. What were your duties when you went to work on February 5? A. We have a room set off that has the two-way radios in; and they have the batteries, extra batteries and battery charger.

Now, the radios, they are about six inches high and about three inches wide and an inch and [368] a half thick. At the bottom there is a battery that connects on. That gives it the power to talk back and forth.

My job is to hand those out with the fully charged battery to the crews going on duty; and when they

return off duty, I take the radios off of them, take the batteries off and put them on the charger and put new batteries on the radio and set it in the cabinet until it is due to go out the next turn.

Q. What were your hours of work at that time? A. When I first started, it was from eight to four.

Q. How much of the time was spent in handing out and getting back the batteries? A. I would say maybe a half an hour, forty-five minutes.

Q. What did you do the rest of the time? A. At that particular time, I did nothing.

Q. Was there a time when you were asked to do some other things? A. Yes.

Q. By the way, under whom do you work? You take your—when you report for work, is there an immediate supervisor? [369] A. Yes.

Q. Who is that? A. Red Nichols, Emerson Nichols.

Q. What is his job? A. He is superintendent of maintenance.

Q. As a clerk, you understood, I gather, that the job you had was not a job that had security of a job that you would have had in your local union as a trainman; is that right? A. Yes, sir.

Q. But that job was made available to you at the discretion of the company; is that right? A. Yes. That is one of my fears that I have right now: stability of my job.

Don't get me wrong. I am grateful for having the job, for having an income, and getting me out of the house so I don't have to stay at home. I went through that for eighteen months with pain, nothing to do.

Q. Well, you have said: that is your fear. What is your fear? A. My fear now, that I won't have any job at all.

Q. About that, let me ask you this: You work with a man named Nichols; and there is a railroad superintendent, I gather; is that right? [370] A. He is the superintendent of maintenance on the railroad, yes.

Q. Who is the superintendent of the railroad who is in charge? A. Oh, Roger Webster.

Q. And Mr. Holtz is here at counsel table. He is the superintendent also, isn't he? A. Superintendent of the railways, yes.

Q. Over the years that you have worked with the railroad, how many different superintendents have there been? A. (No response.)

Q. I am talking about general superintendents. A. Five.

Q. And you have been there at this point seventeen years. A. Seventeen years.

Q. Does the fact that people are changed in authority positions a part of why you fear you may not have your job? A. Yes. People gave me this job. They could be replaced at any time; and if there is ever an economic crisis, I feel I would be the first to go.

Q. What additional responsibilities have you been given? [371] A. Superintendent Nichols has now given me authority to sign the time cards for the employees in the roundhouse; and the COD sheets that we send to the superintendent of the railroad each day, I fill that out for him. That is the sheet that gives the time the crews leave the pit and when they get back on, who the engineer is, who the conductor is.

Q. Do you still hand out the radios? A. Yes.

Q. Of course, you only work one eight-hour shift; is that correct? A. That's correct.

Q. Who hands out the radios when you are not at work? A. Yardmaster on duty, BOF area, or the foreman at the roundhouse at the time.

Q. Is there a yardmaster on duty during the time that you work? A. Yes, there is.

Q. Is a foreman at the roundhouse at the time that you work on duty? A. Yes, there is.

Q. Are you being paid at what is the brakeman hourly rate of pay? [372] A. Yes.

Q. Incidentally, there was some discussion at the outset by the railroad lawyer about your seniority and your position in this job relative to what you would be doing had you been a brakeman and physically able to do that.

Have you been laid off during the periods of time, during the period that you have worked in this clerk position? A. Yes, I have.

Q. How did the periods that you were laid off compare with what you have heard and know to be the layoffs of the man at your level of the roster as trainman? A. I have been laid off a week or two longer than they have.

Q. During the time that you were laid off as a clerk, are the foremen, yardmasters laid off? A. No, they are not.

Q. When you are laid off as a clerk, do you receive any pay? No, I don't.

THE COURT: Mr. Hollander, can you find an appropriate place to stop.

MR. HOLLANDER: Any time, Your Honor. [373] This would be fine.

THE COURT: Is this an appropriate place? All right. We will take our lunch recess. You may step down, sir.

The Court wants to remind the jury of the change of the lunch hour. We are recessing at twelve-thirty, and we want you back by two so that we can get started promptly at two o'clock.

(A luncheon recess was then taken.)

THE COURT: All right, do you want to proceed.

BY MR. HOLLANDER:

Q. Mr. Morgan, we have been provided, through the interrogatory answers from the railroad, with your earnings from the railroad for the years 1976 through 1979 that you have heard read into the record previously.

I would like you to tell us what your earnings were from the railroad in the year 1980. A. 1980, I earned $25,818.85.

Q. Do you have the information regarding your earnings this year, as of the present time? A. Up until November 21 this year, I have earned $25,491.74.

Q. You are married; and your wife, Patricia, [374] resides with you; is that correct? A. That's correct.

Q. How many children do you have? A. Three children.

Q. When is the last you had a child dependent on you? A. I believe that was 1977.

Q. Since 1977 then, have you, as far as your Federal Tax liability is concerned, taken as exemptions, just you and your wife? A. Me and my wife, right.

Q. And how do you base your tax then after you have taken the exemptions? How do you arrive at what your tax is? A. I use the tax formula that comes with the 1040A Form.

Q. The table. A. Yes, the table.

MR. HOLLANDER: Please the Court, we have marked as Plaintiff's Exhibit No. 4 the tax tables for a married person filing jointly based on the 1980 tax table. I would like to offer it into evidence.

MR. REIF: Your Honor, I have no objection except I think the record should indicate, as I [375] believe Mr. Hollander has mentioned, that this is the 1980 tax table.

MR. HOLLANDER: I said that.

THE COURT: It says on it: 1980 tax table.

MR. HOLLANDER: I thought I said that.

MR. REIF: I just didn't hear that part.

MR. HOLLANDER: We know the tax statutes are changing. There will be changes down the line, but I don't know that we have to get into all of that. Is that what you are suggesting we do?

MR. REIF: No.

THE COURT: It is marked 1980 on its face.

MR. REIF: Thank you.

MR. HOLLANDER: Is it admitted?

MR. REIF: Yes, I have no objection to its being admitted.

THE COURT: Exhibit 4 is admitted.

MR. HOLLANDER: You may cross-examine.

CROSS-EXAMINATION

BY MR. REIF:

Q. Mr. Morgan, Mr. Hollander asked you what you did after the accident occurred; and as I understand it, you were at the clearance area in the

* * *

[383] Q. So the only plant physician or mill physician you have seen who has made these—or prescribed these medicines for you, has been Dr. Chancgo. A. Yes.

Q. Mr. Morgan, do you know what your gross earnings from the railroad were in 1977, the year of the accident? A. I could come close. I would say it was a little over $14,000.

Q. And our records—

MR. HOLLANDER: They are in evidence, you know.

MR. REIF: Yes.

BY MR. REIF:

Q. You do not have any dispute with the accuracy of the figures pertaining to your earnings in 1977 and 1973 which have been offered into evidence, do you? A. No, none whatsoever.

Q. In 1979, could you tell me, once again, what your gross earnings were? A. 1979? I would think that was around $21,000. I am not quite sure again.

Q. What is the figure you gave for 1980? A. I couldn't be sure of that. Just a moment. [384] $25,818.85.

Q. And the figure that you gave for 1981 was through what date? A. November 21.

Q. That figure is $25,491.74. A. Yes.

Q. Since you have been back at work, you have been able to perform the duties to which you have been assigned, have you not? A. I have.

Q. It is my understanding that since returning to work on February 5, 1979, you had been paid at the brakeman rate. A. That is correct.

Q. In other words, you are receiving the same hourly rate as you would if you were still working as a brakeman on a railroad crew. A. Yes. The hourly race, yes.

Q. Now, in addition to that, one of the other witnesses explained that the brakeman received incentive pay which is based upon the production achieved by the steel mill. A. Yes.

Q. You are familiar with that, are you? A. Yes.

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[446] Thursday, December 3, 1981

THE COURT: I believe that we had a witness who was being cross-examined, as I recall.

MR. HOLLANDER: Direct.

JOHN J. HOLTZ, having been previously sworn, continued to testify as follows:

DIRECT EXAMINATION
(CONTINUED)

BY MR. REIF:

Q. Mr. Holtz, yesterday when you were here in Court, Mr. Hollander read into the record an earning figure for Mr. Morgan for the year 1979 of $18,934.87 which is a figure which appears in a schedule attached to Answers to interrogatories filed by the railroad.

Are you familiar with the interrogatory answers and the schedule? A. Yes.

Q. The $18,934.87 figure, as shown on the schedule, is through what date in 1979? A. 11/10/79.

[447] Q. Does the $18,934.87 in fact represent Mr. Morgan's gross earnings from the railroad in 1979? A. No.

Q. Can you tell me what that figure is? A. That should be $21,109.

Q. $21,109. A. Yes.

Q. Any cents on that? A. Well, I didn't bother with the cents.

Q. Okay. You had given those cents in your answers to interrogatories here. A. I didn't—I took off the cents.

MR. HOLLANDER: We will accept that as an amendment to the interrogatory answers which has never been amended as of this time. I would be assuming it was responsive to the question offered into evidence.

MR. REIF: Responsive through November 10, Your Honor.

MR. HOLLANDER: The interrogatories were filed in 1980 after the completion of the year, so I accept them for what they are, and I will accept this as a late amendment. I will stipulate to it.

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[449] referring to Defendant's Exhibit G, that in 1977 the total number of ore pellets or total number of ore cars that pellets were received from the Pittsburgh & Lake Erie Railroad was some 10,549 carloads. Is that correct? A. Yes.

Q. What does each railroad car of ore pellets represent in terms of weight? A. They will run from, anywhere, from, say, 80 to 100 tons. Sometimes they exceed 100 tons. Maybe 105. Not very often, but in that area, between 80 and 100 tons per car.

Q. Per car. A. Yes.

Q. That would be for the 10,549 cars. A. Yes.

Q. When you were on the stand yesterday, I believe you had just explained before we recessed that the distance from the No. 5 Scale Track to the clearance area at No. 3 Scale Track is approximately 105 yards; is that correct? A. That is correct.

Q. How do you know that distance? A. I walked it to determine it.

Q. Are you familiar with the job that Mr. Morgan [450] has performed on the railroad since he returned to work on February 5, 1979? A. Yes.

Q. What are his duties in this position? A. Well, basically, it is in the area of a foreman's job.

What it amounts to, he starts his turn by receiving radios and assigning radios to the crews coming off duty and going on duty.

As an example, if he is working the 2:00 p.m. to 10:00 p.m. shift, he would be receiving radios for crews coming in anywhere after 2:00 p.m. and crews going out between 2:00 and 4:00 p.m. We have crews starting at 3:00 p.m. and 4:00 p.m.

And the 7:00 a.m. and 8:00 a.m., in the preceding shifts, same thing.

So, he will handle, say, between 2:00 and 4:30, really, he will be involved in the radio aspect of his job in terms of handing them out, receiving them, checking the batteries, or whatever he has to do.

And also during that time, he is logging in the crew by number, the engine number; the conductor; engineer's name; what time they start; what they refer to as COD report, crew-on-duty report.

[451] Also, he has duties which have been assigned to him by his supervisors which would be the superintendent of locomotive maintenance who works the 8:00 to 4:00 shift and would have lined him up with duties to look after on that turn.

We do have maintenance people working on the 4:00 to 12:00 shift, repairing locomotives. There would be certain things that Mr. Nichols, superintendent, would have assigned Mr. Morgan to see that it is done.

There may be things that maintenance people will need in terms of some type of supply, some need. There will be times during the shift where he will be getting calls from the yardmaster concerning a locomotive that has to be looked at, something of that nature. He will dispatch the maintenance people to that locomotive.

Generally, it is the turn foreman overseeing duties on that shift.

Q. Does he work an eight-hour shift? A. Yes.

Q. Since his return to work on February 5, 1979, has he been paid at the brakeman rate? A. Yes.

[452] Q. What is that hourly rate at the present time? A. Presently, that is paying $11.84 an hour.

Q. Is that rate specified in any agreement that the railroad has? A. Well, there are specified rates; but this figure here is not in here.

Q. The point of my question, Mr. Holtz, what document is that that you are looking at? A. I am looking at the working agreement with the United Transportation Union and the Monessen Southwestern Railway governing brakeman, conductor.

Q. Is that the agreement that governs the wage rates for trainmen and enginemen? A. That's correct.

Q. Now, under the terms of that agreement, will there be any increases in the brakeman's rate in the future? A. Yes.

Q. When will that occur? A. The next scheduled increase on here, basic rate, will be on 8/1/82.

Q. What will the hourly rate be increased to at that time? A. Well, it is spelled out here as $11.34; but [453]

that was when the contract was negotiated; but there are adjustments to these rates according to the cost of living adjustment; so that will be more than that.

Q. Can you tell me how the cost of living adjustments work. A. Well, this is tied in with the cost of living; and there is a formula that they use for a percentage or increase in the cost of living. There is a certain percentage that goes against the hourly rate and is based upon points and so forth. It is based on the consumer price index of the United States Government.

Q. How often in the course of a year are those adjustments made? A. I believe there are about four adjustments per year that they roll in these increases that they get. They roll it into the base rate.

Q. Can you tell me what affect, if any, has the cost-of-living formula had this year in increasing the hourly rates? A. So far this year, it has increased about 79 cents an hour.

Q. Since returning to work on February 5, 1979, Mr. Morgan has also received incentive pay, has he not? [454] A. That's correct.

Q. What is incentive, and how does it work? A. Well, incentive is extra earnings employees receive for, say, an extra effort, extra output above and beyond what is considered normal.

Being that the crews don't produce any product, they just perform a service, it is very difficult to measure their output; but they do have an incentive program based on the production out of Wheeling-Pittsburgh Steel's producing departments.

It would be the basic oxygen production, blast furnace production, rolling and blooming mill production, ore dumping cars dumped. There are five or six departments, production departments that they use; and, of course,

the hours, the railroad service hours, that go into producing that, naturally, is how they calculate incentive. Less hours to go in there, the more incentive or else the more production, the better incentive, so they get an incentive based on production.

It is not on an individual employee basis. Each employee gets the same amount.

Q. Does Mr. Morgan get the same amount as the brakeman and conductor? [455] A. The conductor will get a little bit more because it is based on the job classification; but all brakemen get the same, all conductors get the same, and it might amount to a dollar a day difference.

Q. Would it be true to say then that he is being paid the same incentive that a brakeman receives? A. That is correct.

Q. In addition to the same hourly rate. A. That's correct.

Q. How much time has Mr. Morgan missed from work since February 5, 1979, other than times when he has been either laid off or on vacation? A. Are you saying since 1979 or since he returned to work?

Q. Since he returned to work. A. He had thirteen days in 1979, nine days in 1980, and five in 1981.

Q. How does that compare with his work attendance prior to the date of the accident and, once again, I am referring to time missed from work other than during times when he would have been on vacation or laid off. A. Before the accident in 1977, he had missed [456] eight days up to that point; and in 1976, he had missed fifteen days. In 1975, he had missed twenty days. In 1974, he missed ten. That is as far back as I went.

Q. You mentioned part of his current duties involve the issuance of radios to the railroad crews; is that correct? A. That's correct.

Q. When did these radios come into common use on the railroad? A. They first came into use in—would be in February, 1978.

Q. Was there any particular event that caused that? A. Well, this resulted from the December 1, 1977 working agreement with the trainmen and the Monessen Southwestern Railway that allowed the company to reduce the crew size from—well, total crew size from five to three or in the trainmen category, three to two.

At that time it was on an attrition basis as people returned, so forth, they were permitted to not fill the job.

Q. The crews consisted of employees in the classification of both enginemen and trainmen; [457] is that correct? A. That's correct.

Q. What affect has that December, 1977 agreement had on the total roster of those employees to date? A. Well, it has reduced in number.

Q. How many enginemen and trainmen are currently on the roster? A. 119.

Q. Is that the total number? A. That is the total number.

Q. How is that broken down? A. Seventy-three trainmen, forty-six engineers.

Q. The trainmen would include both brakemen and conductors. A. Yes.

Q. How many were employed in August of 1977? A. Combined total was 201.

Q. Mr. Holtz, there has been testimony in this case to the effect that certain layoffs have occurred this year. Are you familiar with those? A. Yes.

Q. When have those layoffs occurred? A. The first one this year occurred on September 26 for a two-week period and extended partially into [458] the third-week period because when you come back into operation, we

came back slowly; and we didn't come back to full production or the previous production, let's say.

You asked for the first one.

Q. Well, if you could, I would like you to explain the total number of layoffs that there have been, if they occurred, if there has been more than the September layoff. A. The second one began on November 15 and for a three-week period which includes the week of right now.

Q. Why have these layoffs occurred?

MR. HOLLANDER: Your Honor, objection. It is not relevant.

THE COURT: The Court will overrule the objection, but we are going to—I am going to ask counsel to come to side bar, please.

(At side bar.)

THE COURT: The objection has been made, and I will permit this question, but I don't feel that the economic picture in the United States and in the steel industry is particularly relevant to this case.

MR. HOLLANDER: I would like to state that [459] my opinion is that it is highly prejudicial, in violation of the law of Pennsylvania that clearly says that wealth or lack of wealth of the party, insurance or absence of insurance of a party is irrelevant; and to indicate that there may be economic hard times in business for this company would be highly prejudicial and clearly in violation—

MR. HOLLANDER: Your Honor, if I may respond to that, the point of the question is not to go into the wealth or lack of wealth of the corporation. The point of the question is to develop—and there has already been testimony in the case when their last layoff was—what has

happened to the number of pensioned men and trainmen, enginemen working out of the crew size.

THE COURT: That isn't what the question asked.

MR. HOLLANDER: Ask that question, then.

MR. REIF: I will withdraw the question.

(End of side bar conference.)

BY MR. REIF:

Q. Mr. Holtz, during these layoffs, what has happened to the crew sizes? Have there been any reductions in their size? [460] A. I assume you mean the number of crews.

Q. Yes. A. Yes. We have only had a few crews at the plant to furnish what service is needed during the shutdown. That is the limit of the service. The coke plant is still operating because you can't shut that down. We have a rail mill that is just now coming on. There is some business for the rail plant.

Q. With regard to those employees who have continued to work during those layoffs, what has their seniority been? A. Say that again.

Q. With the crews who are working, do they work on the basis of their seniority? A. Yes.

Q. Can you tell me during the two layoffs that you have mentioned, which have occurred this year, had Mr. Morgan continued to work as a brakeman, would his seniority, which began in April of 1964, have permitted him to continue to work on a train crew? A. Well, in the first shutdown, he would not have worked the first week of the shutdown.

The second week we had a need for some [461] additional people; and we brought a couple back, two back. There were—one was junior to Mr. Morgan; so that would have brought him back in the middle of the second week.

Now, I might explain that they don't—there is—they don't have the seniority as such to hold the jobs. We have what is called voluntary layoff; and when there is a layoff coming, say we are going to furlough X number of people, the senior people have the right to accept the layoff; so, if you want to lay off twenty people and you had twenty senior people that say I will take it, those twenty senior people would go out; and the junior people would work.

Now, that is the reason junior people are permitted to work during that second week. We had quite a few senior people that opted to take furlough.

In the second instance—now, this gets complicated—in the second instance, second shutdown, this is all tied in with the supplemental unemployment benefit program. When that program—when those funds are diminished, senior people don't have the right to take layoff because there is [462] something else involved here, there is twenty-year seniority. They are guaranteed the subpayment.

So, it is a question of: Are you going to let senior people go out on the street, pay them subpay and let junior people work, and that is contrary to what the program was set up.

So, during the second shutdown, it is only, basically, senior people that are now working.

Q. Those would be the people with twenty or more years of seniority. A. That's correct.

Q. But as I understand your testimony, had Mr. Morgan been working as a brakeman during the first shutdown, which occurred in September, he would have been eligible to work during the second week. A. That is correct.

Q. Now, Mr. Morgan has also been laid off during certain periods of time this year, hasn't he? A. Oh, yes.

Q. Can you tell me for what periods of time he has been laid off? A. Well, it coincided with the same time that the brakemen are laid off, so that would be in [463] September, shutdown time, and also during this current November, three-week shutdown time.

Q. So would it be true to say, based upon your testimony, that the total additional amount of time that he could have worked this year as a brakeman during the shutdown periods would have been one week? A. (No response.)

Q. In other words, he has been laid off during both shutdowns. A. Yes.

Q. But had he been working as a brakeman, he would have been eligible to return one week earlier in September. A. Yes. Yes, that is correct.

Q. Will he return to work at the end of this layoff period? A. I expect him to, yes.

Q. Does Mr. Morgan's seniority in his current job have any bearing on whether or not he is furloughed or recalled to work?

MR. HOLLANDER: Excuse me. I guess I have to object to the question. We don't know, first of all, whether he has any seniority as it is typically referred to or as it has been described [464] in the case so far.

MR. REIF: I will be happy to develop that.

BY MR. REIF:

Q. Mr. Holtz, can you tell me—well, strike that.

Mr. Morgan's seniority as a trainman with the railroad began on what date?

MR. HOLLANDER: In April, 1964. It has been read in.

THE WITNESS: April, 1964.

BY MR. REIF:

Q. Now, since he has been working in his present job capacity since February 5, 1979, has he retained—what has happened to his seniority? A. It has remained unchanged. He still is listed on the trainman roster in the same position.

Q. What application, if any, does his seniority as a trainman have to his present job? A. None.

Q. Does his seniority come into play in any way during those periods of layoff that you have described and recall? A. No.

Q. What factors then determine why he is laid off [465] or why he is recalled? A. Well, there is no need because we got the crews cut off.

Q. I am not sure I understand that. Are you saying that—

MR. HOLLANDER: Excuse me. Let him explain it.

BY MR. REIF:

Q. Could you explain that for me? A. Well, we don't—the crews are laid off. We only have one or two crews working; so, we don't have a need for that.

Q. In other words, his job, duties, are closely tied with the function of the crews. A. Yes.

Q. And when the crews are off, he is off. A. Right.

Q. When the crews come back, he comes back. A. Yes.

Q. Does the Monessen Southwestern have a pension plan? A. Yes.

Q. Is Mr. Morgan covered by that plan? A. Yes.

Q. Has his change in job status as of February 5, [466] 1979, affected his eligibility to retire in any way? A. No.

Q. Can you tell me how many years of service are required on the railroad before an employee is eligible for retirement? A. Well, they have to have a minimum of fifteen years of service.

Q. Is there a compulsory retirement age on the railroad? A. Yes.

Q. What is that? A. It is now 70.

Q. Since you have been employed by the Monessen Southwestern, do you know of any enginemen or trainmen who have worked until age 70? A. No.

Q. Mr. Holtz, are you the one who provided me with the August 27, 1977 conductors' yard report which Mr. Feehan used to describe the train movements on the date of the accident? A. Yes.

Q. Where did you obtain that report? A. In the record storage room of the Monessen Plant of Wheeling-Pittsburgh Steel.

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[577] Friday, December 4, 1981

(In chambers discussion.)

THE COURT: On the issue of present worth, we have spent considerable time, as both counsel knows, considering this matter; and we do think that it is a very narrow issue; and that the law, as we see it, is far from clear; however, we have reached the decision not to give the present-worth charge; and the basis for the Court's decision is the Bolubase Decision and the opinion of Justice Nix.

As we read his language, it appears to me that what he is doing is establishing, really, a procedural method for calculating an award for loss of future earnings; and that if you look at his opinion as being procedural, then it seems to me that it would be applicable.

The other reason that compels the Court is that there is dicta in a number of these cases to the effect that until there has been some clear decision in FELA cases by the United States Supreme Court, the law of form should apply.

You see that dicta in a number of places; so, therefore, in view of the fact that [578] I had been unable to find a federal case in which we have a state that uses the kind of calculations that Pennsylvania does, and no clear ruling, it seems to me by the United States Supreme Court that the law, the form decision of Justice Nix should apply.

The third reason that I had reached the decision that I have is basically a matter of public policy; and I guess we would state it like this: After years of listening to that charge on present worth that is given to juries, I think it is a charade. I don't think the jury understands what you are saying. I am not sure the judge understands, him or herself, what is being said. It just doesn't mean anything.

If you attempt to determine the basis of the jury's calculations, it is impossible. In fact, when we still use the present worth in Pennsylvania, it always seems to me that, you know, the judge talks on; and, now, you have to reduce this to present worth on the legal rate of six percent and please don't ask me any more questions about that issue. I don't think that that is the way that you calculate damages.

And, I guess, the fourth reason would [579] be that I view this recent decision by the Pennsylvania Supreme Court, what is it, the Liepelt case that we had been looking at—

MR. REIF: U.S. Supreme Court.

THE COURT: Yes, as an attempt to put reality into the calculations of damages. I think that one of the things they did was to recognize what was going on in the year 1981 as opposed to the year 1911. I am aware in making this decision that there is a long line—or not a long line—but there are a number of federal cases from that 1911 decision, Chesapeake, that talks about reduction to present worth.

It is the Court's feeling that the reduction to present worth has occurred by the next method; and we have to move on; so that the decision has been made.

(Discussion held off the record.)

MR. REIF: May I note my exception?

THE COURT: Yes.

MR. REIF: I would like to note an exception to Your Honor's ruling on the basis that I think in dealing with the Federal Employee Liability Act, a federal statute, the damage issue is a matter of federal law.

* * *

[585] I will give five, but I give it as a part of cautionary instructions. I would not give it as a separate charge. I will instruct them that they are—they determine the facts. They shouldn't draw any conclusions as to the Court's opinion, that sort of thing. It is part of the general language of the charge.

Six, yes.

We have already ruled on seven: that we are not going to give a present worth charge based on the Bolubase Opinion.

On eight, yes.

Nine, yes.

All right, now, ten is where you reopen this matter. This is whether or not you talk about net or gross earnings; and your position is that on past losses, it is net.

MR. REIF: Your Honor, it is our position on the basis of the Liepelt Decision that on all losses it is net; and, for that reason, I think that Point Nine should be modified. In other words, my reading of the case law is that the jury should be instructed that on any loss of past wages and also on any amount that this man may lose in the future, because of his earning [586] capacity, the jury should know, No. 1, that any award is not subject to income tax.

THE COURT: Well, that they are going to be told.

MR. REIF: And, No. 2, that that calculation should be made on the basis of what he would actually or reasonably receive after the deduction of taxes on the rationale that that is all he is entitled to on that element of damage.

For example, the wage differential between Mr. Morgan and another employee in a given year is X-dollars. He would not receive, for example, the year that he didn't work at all in 1978, one employee earned $25,000, that employee did not receive $25,000. Had he received $25,000, he would have had to earn $30,000; and to allow the jury to make these calculations either on past lost earnings or future lost earnings without taking taxes into effect gives this man a windfall; and Liepelt, I think,

makes it clear that in both categories of losses we are talking about net; and they should be instructed on the tax consequences.

MR. HOLLANDER: We have really been [587] through this. The Court did rule that the Liepelt charge would be given; and that is the question of net earnings, net loss of earnings for the injury. We have submitted tax tables for that purpose.

THE COURT: They are also submitting a joint table, to use those tax tables on, that the jury does that.

MR. HOLLANDER: I, of course, except to any instructions; and I would like to, at this point, indicate to the Court that I would except to the Court's granting Point No. 9 because earlier—and still I think Liepelt doesn't apply to this case—with regard to actually telling the jury they are to—

THE COURT: What about the future? What is your position?

MR. HOLLANDER: I don't think the jury is to be told that they are to take the tables and apply them. I think they may if they choose and may not if they don't choose.

Liepelt would simply say it was error to refuse to admit evidence of income tax effects and said that the Court should grant points for charge on instructions that the verdict—or award [588] of the jury is not subject to taxes and, therefore, should not take them into account in making their award which is sort of, actually, cross purpose, I think; but I think it should be left alone at this point; and the Court indicate points, instruct within accordance with Liepelt instructions, decision.

MR. REIF: That is why I am saying, Judge, I want to add: My position is that Liepelt modifies decisions such as the 1971 Third Circuit Decision in Donraki. I think the jury has to be instructed that any award they make is not subject to tax.

MR. HOLLANDER: She is going to do that. That has been granted.

MR. REIF: I understand but I don't think they can be told, in view of Liepelt, that they, therefore, should neither add or subtract taxes in fixing the amount of the aware because Liepelt makes that clear on past loss earnings and future earnings. The tax consequences have to be taken into account.

MR. HOLLANDER: Liepelt says that that is the charge that is to be given. They should neither add nor subtract from. That is the language [589] of the United States Supreme Court.

THE COURT: They don't give more to cover tax liability, but they don't—I am going to leave it the way we had it, you know. They are aware that taxes have not been computed. Now, of course, the other thing you get into in this issue is that, of course, you know, they consider, in effect, you gave me the language; and I have this here, have all of the different factors that they consider in terms of his loss of future earnings, whether it is increased, decreased, you know, whether he secured other employment—I think these are all factors; but I am not going to instruct them that they use the terms net and gross which is what we got into. I think that the factors should be given to them, but we are not going to instruct them as to the matter of gross.

MR. REIF: Well, Your Honor, will they be told anything about taxes?

THE COURT: I am going to give them the charge that is in the Liepelt case, the actual language there; and I think we had it, that we went through this, as I recall, at the time that—they will be instructed in the instructions in [590] this case.

It says here: Your award will not be subject to any income tax; and you should not consider such tax in fixing the amount of your award, which is the charge that the Court refused; and which they felt should be given.

So, this would be the charge as set forth on Page 492 of the opinion.

MR. REIF: I guess what I am asking, I am not sure I clearly understand how Point No. 10 will be handled.

THE COURT: We are not going to use the word net earnings. We are going to use on his earnings; and, then, we are going to add: You may consider the following items; and that is any money that he may earn and any increases or decreases that would occur over his earning life. I am going to give them the standard language relating to the various factors that they consider which really affects the gross that you are talking about.

MR. REIF: Right.

THE COURT: But, I am not going to use the words net, gross because I did not find them in any of the opinions.

[591] MR. REIF: Now, that, however, does not preclude me in my closing from arguing to the jury that one factor they can take into effect, if they so choose, are the tax consequences and the fact that, for example, when we pointed to $25,000 in one year, that is not what he would have received.

THE COURT: Yes, but I am not going to instruct them what they have to take—

MR. REIF: No. I just wanted to be sure in my closing I did not—

MR. HOLLANDER: Let me, for the record, so as not to stand and object in the middle of your argument, I take the position, view of the earlier opinion and except to Liepelt in any degree that any earnings argument, regardless loss or lost earnings as being net after tax earnings, would be objectionable; and I would object to it strenuously at this point. I would like to state that in advance.

MR. REIF: Well, I want to note an exception to the Court's ruling on this point; but, also, I want to make it clear that I did not mean to imply that my argument was going to be in the context that that is how they are to be [592] calculated, this is the way the Court will instruct you.

I simply plan to say: In arriving at a damage award, you can use your common sense and there are many considerations that can be taken into account. One is income tax.

MR. HOLLANDER: Well, I object to that. I do that in anticipation of the argument.

MR. LOWENSTEIN: When you are talking of Point 10, were you going to give a charge on increased earnings? Were you talking about anything in terms of adjusting earnings for raises that might come as the inflation increases and as salary doing the same job would increase partly because of inflation, something like that?

THE COURT: No, because under nine, the decision of the Court has to be consistent; and we are not giving present worth; and therefore, we would not give an inflationary charge.

Eleven, yes, but not the second paragraph of eleven which uses specific percentage numbers.

Twelve is no.

All right, does that do it for us?

* * *

[622] You should not award damages which are conjectural.

Now, I would just like to speak with you about a couple of damage principles because I talked about specific figures in this case. There are a couple of things that you have to be aware of that are unusual or somewhat different about a case of this type: The most important thing is, as the Judge will instruct you, any verdict that you render, should you decide to award Mr. Morgan damages, is not subject to income tax; and by income tax, I mean Federal Tax. State Tax, Local Tax. It is tax free.

Secondly, you are entitled to use your own common sense and judgment in arriving at the amount of any award. We have already mentioned the contributory negligence factor and how that affects an award of damages: If he is twenty-five percent contributory negligence, it would reduce the award by a quarter; if he is fifty percent, a half; so on.

Another thing that you are entitled to consider, and this calculation has been prepared and offered into the record by Mr. Hollander and as a joint exhibit, is what affect would taxes have. Now, there

is a distinction [623] here. The award itself is not taxable; but when we get into the question of past lost earnings or future earnings, you are entitled to consider what the tax effect is; and that is why we have prepared this chart to show the differential between Mr. Morgan's earnings, Mr. Schuster's earnings, and Mr. McKosky's earnings to date beginning in the year 1977; and one instance it is $50,000; and in another instance it is some $46,000; but the reason that the tax consideration is important and valid is that the intent behind any damage award is to place the person in the position that they would have been in economically had they not been injured.

I think, perhaps, the best example that I can give you would be when you have this joint exhibit with you, if you would look to the year 1978 when Mr. Morgan performed almost no work, there, for example, we have Mr. McKosky with earnings of $25,000.

Well, of course, $25,000 is not what Mr. McKosky received after taxes. That was not spendable income. In order for him to have had $25,000 in spendable income, he would have had to [624] have earned significantly more. That is how the tax consideration comes into play.

You should use your own judgment on that. You are also entitled to use your understanding and knowledge of economic conditions, interest rates, and a number of other things. We know that if you decide to make an award, any amount that this man will receive is tax free. You are entitled to consider, if that amount of money is invested, what can he

earn? What can you earn at today's interest rates or any other interest rates you think is applicable to a given amount of money?

Now, let's specifically turn for a few moments to the lost wages, impairment of earning power argument made in this case. I have already discussed this exhibit with you. You have it. You will see what the earnings are. You can form your own conclusions about what the impairment or loss has been to date.

With regard to any future loss, the argument that is being made here is really twofold: First of all, this man has no plant seniority according to the plan because his seniority no longer applies; and, secondly, he has been prejudiced [625] because he is earning less.

Okay. I would like to spend just a couple of minutes with you on both of those arguments. What about his job security in the sense: Is he physically capable of performing his job? I don't think there is any question about that at all. On the basis of the medical, so we really don't have a legitimate argument, at some point in time Mr. Morgan physically is not going to be capable of performing his duties with regard to the radios or the various forms or the clerical types of things that he does in his current position; secondly, with regard to his earning potential, there we know he is being paid incentive. We know he is being paid at the brakeman rate. We have heard about the cost of living adjustments and the hourly increases that go into effect under the collective bargaining agreement. I think it is significant, when you look at this exhibit and get into current periods of time,

such as 1980, the difference between Mr. Morgan's earnings and those of Mr. McKoskey, who is an individual who did take his vacation, are less than $4,000, roughly $3,700. You also are entitled to take into account a number of [626] other factors: Will he continue to work with his physical condition until age 70? Do any people on the railroad work until age 70? Will he retire? Those are things that you have to take into account in making any award or adjustment for any future detriment that you fell this man has.

As far as the pain, suffering, I have already touched upon that. That is a damage element; but let's just spend a moment on the seniority issue because that is what the whole damage argument is based upon; and I submit to you, ladies and gentlemen, that that issue is another red herring in the case because the testimony has been—and this is not a case where there is evidence of a callous employer who has not tried to help this man, create a job and put him to work, that he has been given a job that is directly tied to the railroad crews as far as the forms, the radios, and other things, the testimony has been that when there is a layoff or furlough and the crew sizes have been reduced, which means that Mr. Morgan wouldn't be working if he were a brakeman, he has been furloughed also.

The only exceptance is that had he been a brakeman, he would have been eligible to work one

* * *

[697] in the past. Now, evidence, again, has been presented to you. You have received compulations of what other persons in similar job categories to the

plaintiff have received over this period of time, and you also have received testimony that for a portion of this period the plaintiff has been working.

In determining what the past loss of earnings have been, you are required to consider the net earnings of the plaintiff—or, I am sorry, the net loss of the plaintiff. In other words, you consider what the plaintiff could have earned and what the plaintiff actually, in fact, did earn and any other circumstances that would affect the losses which he has incurred. You calculate any past lost earnings between the date of the injury and the date of the award on the basis of the net earnings; and the net earnings has, as has been defined at the earnings which are left to the plaintiff after the payment of income tax, and you have received a listing of the earnings of the plaintiff, not only the earnings that he would have made but the earnings that he actually made, and you should also consider, in determining the past earnings, the factor of [698] income tax which the plaintiff would have to pay on any loss that he has suffered. In other words, his wages would have been subject to tax. If you award him lost wages, that you should also consider that as subject to tax.

Now, the next area constitutes the future lost earnings. The plaintiff is claiming in this case a loss of future earnings or an impairment of earning capacity. Now, the impairment of earning capacity is not based on a particular—entirely on a particular salary figure. It may be—it is not true in this case—but the plaintiff may be earning more than he may have prior to the injury but, nevertheless, be

suffering a loss of earning capacity in that his ability to take or seek certain employment has been limited. You have been given, by the plaintiff, plaintiff's counsel, a statistical table to give to you the life expectancy of a man of the plaintiff's age; and you recall that in the plaintiff's testimony, he testified to the fact that he is presently fifty years old. The date of the retirement from the railroad company is age 70. The plaintiff also placed into the record the

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[702] the Court would instruct the jury that any moneys that would be awarded to the plaintiff would be reduced to something called present worth. The law now provides that there need not be such a reduction and that the jury, however, is not to consider the inflation rate in arriving at an appropriate figure in the way of damages. By the result of a court decision, the inflation rate and present worth have been equated with each other; and you need not make any adjustment in your verdict for either of those two factors.

That concludes the Court's charge on damages except for one point which is to the effect that a verdict, money award in damages, are not subject to the payment of income tax; and you may take that into consideration in arriving at your verdict.

As stated in a recent federal case, your award will not be subject to any income taxes; and you should not consider such taxes in fixing the amount of award as to damages to be received for future loss of earning capacity.

All right. This concludes the Court's charge. Before I give the jury the verdict slip, does counsel want to come to side bar?

* * *

[712] MR. HOLLANDER: That's all.

MR. REIF: Your Honor, I have a number of exceptions: First, on the basis of the recent Liepelt Supreme Court decision by the Supreme Court and other decisions which develop the body of federal case law pertaining to these exceptions, I except to the Court's failure to charge on a reduction to present worth and also the portion of that, of the Court's charge, which explained the effect of recent decisions. I agree with Mr. Hollander on that. I don't think anything should have been said about inflation or reduction, if the Court's decision was not to charge at all. But, of course, I think that charge should have been given; and despite the recent Pennsylvania Supreme Court decision in Bolubase, there is a body of federal case law that has existed for years which permits the jury to make a reduction using their understanding of common factors such as interest, that type of thing.

Secondly, I except to the Court's limitations of its charge on the tax effects to simply the past lost earnings. Once again, I think there is precedence in cases such as [713] Liepelt to the effect that the net earnings consideration is one which has to be applied or at least charged on with regard to past-lost earnings and any possible future loss due to an impairment.

Thirdly, Your Honor, I think that the portion of the charge relating to the possible notice of a hazardous condition that the railroad might have was prejudicial in the sense that the jury was instructed, in effect, that if the railroad has notice of such a condition, it then must exercise reasonable care to remove that condition; and I think the phraseology was something to the effect: within a reasonable period of time. I don't have the exact language. The point of my objection there is that we are dealing, as Your Honor knows, with a very unusual situation in this case involving ore pellets that are brought into the plant by hundreds of thousands of tons. I doubt this is a condition which we contend, and a part of our defense, is impossible to remove. I think that that instruction should have been given in the vein of removed or alleviated or some other language; but it is physically impossible to eliminate having ore pellets on the ground within

* * *

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[716] GERALD L. MORGAN,

Plaintiff,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, A Corporation,

Defendant.

No. 23765 of 1979.

VERDICT

And now, to wit, this 4th day of December, 1981, we the jury in the above-entitled case find for the Plaintiff in the amount of $125,000.

THE COURT: Does anyone wish the jury polled?

MR. HOLLANDER: I would like to have the jury polled, Your Honor.

THE COURT: Would you poll them, please.

THE CLERK: Members of the jury, you have heard your verdict as read. Juror No. 1, is this your verdict?

JUROR NO. 1: Yes.

THE CLERK: Juror No. 2, is this your verdict?

JUROR NO. 2: No.

* * *

[718] verdict?

JUROR NO. 11: Yes.

THE CLERK: Juror No. 12, is this your verdict?

JUROR NO. 12: Yes.

THE CLERK: The jury has been polled, Your Honor.

THE COURT: Thank you. Is there anything else to be brought to the attention of the jury?

MR. HOLLANDER: Yes, Your Honor. May we approach the bench; or we can do it in open court. I would like to move to have the verdict molded in accordance with Rule 238.

THE COURT: Well, suppose we let the jury go; and we can resolve this. This is simply a legal question which would not involve the jury.

Ladies and gentlemen of the jury, I am not going to keep you here for a long speech. I think I can state not only on behalf of the Court but on behalf of counsel and the parties to this case that we appreciate your services to us. I would just like to add my own personal note that I realize that today was a rough day . . .

(The jury was then dismissed.)

[719] (In chambers discussion.)

MR. HOLLANDER: As indicated in open Court, Your Honor, I move to mold the verdict to add damages pursuant to Rule 238 at the rate of ten percent annum. The effective date of it, let's see, this suit was filed—I guess the effective date would be October 30, 1979. I can double check that.

THE COURT: Do you want the rules?

MR. HOLLANDER: I should add: For the reason no written offer within 125 percent—no. No written offer has been made that would prevent the application of the rule.

THE COURT: Is that correct?

MR. REIF: I believe that is, Your Honor, to my knowledge. I think the only offer that has been made was in the vicinity of $60,000. I am not sure.

MR. HOLLANDER: There was a written offer of $65,000.

MR. REIF: $60,000 to $65,000.

MR. HOLLANDER: $65,000.

THE COURT: So this would come—do you want me to do the arithmetic on it?

MR. HOLLANDER: I will be glad to do it. [720] It should be a part of the verdict to record the judgment.

THE COURT: All right. Well, we have to get a—

MR. HOLLANDER: I will get the date.

THE COURT: It will be molded by the Court under Rule 238. That is for ten percent delayed damages; and, then, you bring me in an amended verdict petition to—I mean, I think you want to get it right.

MR. HOLLANDER: I do and—

MR. REIF: I would like to have a chance to do that, myself. Tom, I am not—I would like to have a chance to make that calculation.

(End of in chambers discussion.)

APPENDIX D

Requested Points for Charge of Defendant

(Stamp Illegible)

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

Civil Division
No. G.D. 79-23765
Issue No. 109611

GERALD L. MORGAN,

Plaintiff,

vs.

MONESSEN SOUTHWESTERN RAILWAY COMPANY, a corporation,

Defendant.

REQUESTED POINTS FOR CHARGE OF DEFENDANT MONESSEN SOUTHWESTERN RAILWAY COMPANY

Code 005 - Trespass - F.E.L.A.

Filed on Behalf of Defendant Monessen Southwestern Railway Company

Counsel of Record for this Party:

Eric P. Reif, Esquire
Pa. I.D. #00194

Appendix D—Requested Points for Charge of Defendant.

Reed Smith Shaw & McClay
Firm #234
P.O. Box 2009
Pittsburgh, Pennsylvania 15230

[412] 288-3262

Dec 4 6:36 PM '81

• • •

[-5-] damages should or should not be allowed. This is a matter solely for your determination under the rules of law as I have given them to you.

Eulc v. Deval Aerodynamics, Inc., 47 F.R.D. 35, 43 (E.D. Pa. 1969).

6. You are instructed that in considering your verdict you should take into consideration the fact that not all persons live to the age of expectancy, that a person may choose not to work all the years of his work life and that a person's earnings may vary, diminish, or cease in the future from causes in no way connected with injury.

7. If the jury should find that the plaintiff is entitled to a verdict, and further find that the evidence in the case establishes a reasonable likelihood of loss of future earnings, then it becomes the duty of the jury to ascertain the present worth in dollars of each future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the plaintiff will in effect be reimbursed in advance of the

Appendix D—Requested Points for Charge of Defendant.

loss, and so will have the use of money which he would not have received until some future date, but for the verdict.

[-6-] In order to make a reasonable adjustment for the present use, interest free, of money representing a lumpsum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lumpsum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and the reduce, or in effect deduct from the total amount of anticipated future loss whatever the amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time; and include in the verdict an award for only the present-worth—the reduced amount—of the total anticipated future loss.

As already explained to you, this computation is readily made by using the so-called "present worth" tables which the Court has judicially noticed.

McCray v. Illinois Cent. R.R., 12 Ill. App.2d 425, 139 N.E.2d 817 (1956).

8. I charge you that your determination of the amount which will reasonably compensate the plaintiff for the pain and suffering, if any, undergone by him must be made from a fair and [-7-] impartial point of view under your enlightened consciences, being fair to both parties. In making this determination, you must not and are not entitled to consider what you yourself would

Appendix D—Requested Points for Charge of Defendant.

want or take to undergo such pain and suffering, if any, or what you yourself would want or take for any friend or any member of your family to undergo such pain and suffering because to do so would result in a prejudiced determination rather than a fair and impartial determination as you are bound by law to do.

9. In calculating any award of damages for a loss of future earnings, you should be aware of the fact that any such award will not be subject to Federal Income Taxes and you should not therefore either add or subtract taxes in fixing the amount of your reward.

Domeracki v. Humble Oil Refining Co., 443 F.2d 1245 (3 Cir. 1971), *cert. den.* 404 U.S. 883 (1971).

Baldwin v. Wrecking Corp. of America, 464 F.Supp. 175, 184 (E.D. PA 1979).

10. If your verdict is in favor of plaintiff, you should calculate any past loss of earnings between the date of his injury and the date of your award on the basis of his net earnings, *i.e.*, the earnings left to him after the payment of income taxes.

Ryan v. United States Lines, 303 F.2d 430 (2d Cir. 1962).

* * *

APPENDIX E

Motion of Defendant for Judgment *N.O.V.*

[-2-]

* * *

MOTION OF THE MONESSEN SOUTHWESTERN RAILWAY COMPANY FOR JUDGMENT NON OBSTANTE VEREDICTO

The Monessen Southwestern Railway Company, through its attorneys, Reed Smith Shaw & McClay, hereby requests that this Court enter a judgment *Non Obstante Veredicto* for the reasons set forth below:

A. The Damage Issues In This Case

1. This Court erred by refusing to instruct the jury, as requested by defendant, that any award of future damages which the jury might make because of plaintiff's contention that his earning power had been impaired had to be reduced to present worth. The Federal Employer's Liability Act ("FELA"), 45 U.S.C.A. §51, *et seq.*, is a federal statute which provides legal recourse to employees of railroads engaged in interstate commerce who suffer injuries during the course of their employment which are caused, in whole or in part, by the negligence of their employer. Questions concerning the measure of damages under the FELA Act are federal in character and a well-established body of federal case law, including the recent decision by the U.S. Supreme Court in *Norfolk and Western Railway Company v. Liepelt*, 100 S.Ct. 755 (1980), makes it clear that a charge on reduction to present worth is mandatory in FELA cases when evidence of future pecuniary loss is presented. [-3-] This Court therefore erred in refusing to give the requested charge on a reduction to present worth on the theory that the decision by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz* does not permit such a jury instruction.

2. This Court erred by refusing to instruct the jury, as requested by defendant, that any calculation of future lost earnings, in addition to past lost earnings, had to be on the basis of plaintiff's net earnings—*i.e.*, the earnings left to him after payment of income taxes. This damage issue is again governed by federal case law and several federal decisions, including *Liepelt, supra*, indicate that this instruction should be given.

3. This Court erred in molding the jury verdict of $125,000.00 by adding "delay damages" pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure. The effect of this molding was to increase the amount of the verdict from $125,000.00 to $151,712.50. Again, the measure of damages under the FELA Act is a matter of substantive federal law and the application of any such state rule to the jury verdict is improper and undercuts the uniformity of federal case law dealing with the measure of damages in FELA actions. Further, Rule 238 is unconstitutional.

[-4-] 4. This Court erred by, after refusing to instruct the jury on the method of reducing any award of future damages to present worth, indicating to the jury that such reductions are no longer permitted in Pennsylvania Courts because of the effect of inflation. Although this Court did instruct the jury that it was also to disregard any inflation factor in reaching its verdict, this portion of the charge was an incorrect statement of the substantive federal law which governs the measure of damages in FELA actions and should not have been given.

B. Other Portions Of The Charge To The Jury.

5. This Court erred in instructing the jury about certain uncontested facts in this case. Specifically, the Court instructed the jury that it was uncontested that the FELA Act applies or that plaintiff was injured during the course of his employment while working in the railroad yard. Although defendant does not take exception with this portion of the charge, the Court then continued by explaining that it was uncontested that the accident occurred when plaintiff stepped on an ore pellet, or pellets, which represented a hazard. The issues of whether the ore pellets constituted a hazard and whether defendant had fulfilled its duty of exercising ordinary care to provide a reasonably safe place to work by adequately cleaning and maintaining the walkways in the railroad yard were, of course, critical issues for the jury's determination and this Court erred by instructing the jury, at the outset of the

* * *

APPENDIX F

Motion of Defendant for a New Trial

[-2-] * * *

MOTION OF THE MONESSEN SOUTHWESTERN RAILWAY COMPANY FOR A NEW TRIAL

The Monessen Southwestern Railway Company, through its attorneys, Reed Smith Shaw & McClay, hereby requests that a new trial be granted in the above-captioned matter for the following reasons:

The Charge To The Jury

1. This Court erred by refusing to instruct the jury, as requested by defendant, that any award of future damages which the jury might make because of plaintiff's contention that his earning power had been impaired had to be reduced to present worth. The Federal Employer's Liability Act ("FELA"), 45 U.S.C.A. §51, *et seq.*, is a federal statute which provides legal recourse to employees of railroads engaged in interstate commerce who suffer injuries during the course of their employment which are caused, in whole or in part, by the negligence of their employer. Questions concerning the measure of damages under the FELA Act are federal in character and a well-established body of federal case law, including the recent decision by the U.S. Supreme Court in *Norfolk and Western Railway Company v. Liepelt*, 100 S.Ct. 755 (1980), makes it clear that a charge on reduction to present worth is mandatory in FELA cases when evidence of future pecuniary loss is presented. [-3-] This Court therefore erred in refusing to give the requested charge on a reduction to present worth on the theory that the decision by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz* does not permit such a jury instruction.

2. This Court erred by refusing to instruct the jury, as requested by defendant, that any calculation of future lost earnings, in addition to past lost earnings, had to be on the basis of plaintiff's net earnings—*i.e.*, the earnings left to him after payment of income taxes. This damage issue is again governed by federal case law and several federal decisions, including *Liepelt, supra*, indicate that this instruction should be given.

3. This Court erred in molding the jury verdict of $125,000.00 by adding "delay damages" pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure. The effect of this molding was to increase the amount of the verdict from $125,000.00 to $151,712.50. Again, the measure of damages under the FELA Act is a matter of substantive federal law and the application of any such state rule to the jury verdict is improper and undercuts the uniformity of federal case law dealing with the measure of damages in FELA actions. Further, Rule 238 is unconstitutional.

[-4-] 4. This Court erred by, after refusing to instruct the jury on the method of reducing any award of future damages to present worth, indicating to the jury that such reductions are no longer permitted in Pennsylvania Courts because of the effect of inflation. Although this Court did instruct the jury that it was also to disregard any inflation factor in reaching its verdict, this portion of the charge was an incorrect statement of the substantive federal law which governs the measure of damages in FELA actions and should not have been given.

Appendix F—Motion of Defendant for a New Trial.

5. This Court erred in instructing the jury about certain uncontested facts in this case. Specifically, the Court instructed the jury that it was uncontested that the FELA Act applies or that plaintiff was injured during the course of his employment while working in the railroad yard. Although defendant does not take exception with this portion of the charge, the Court then continued by explaining that it was uncontested that the accident occurred when plaintiff stepped on an ore pellet, or pellets, which represented a hazard. The issues of whether the ore pellets constituted a hazard and whether defendant had fulfilled its duty of exercising ordinary care to provide a reasonably safe place to work by adequately cleaning and maintaining the walkways in the railroad yard were, of course, critical issues for the jury's determination and this Court erred by instructing the jury, at the outset of the

* * *

APPELLANT'S

BRIEF

Supreme Court, U.S.
FILED
NOV 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1743

IN THE

Supreme Court of the United States

October Term, 1986

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR APPELLANT

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Questions Presented

1. Whether a state court rule (Pa.R.Civ.P. No. 238) authorizing an award of delay damages (prejudgment interest) of 10% per annum in common law bodily injury cases filed in state court violates federal law and the Supremacy Clause of Article VI of the Constitution of the United States when applied to a Federal Employers' Liability Act case brought in state court?

2. Whether the state trial court's automatic adoption of Pennsylvania's "total offset" rule for reducing an award of future damages to present value as a rule of decision in this FELA case and its concomitant refusal to instruct the jury that an award of future damages must be reduced to present value violates the mandates of this Court in *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985) and *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983)?

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TABLE OF AUTHORITIES.

Cases.

Adriance v. Brooks, 13 Tex. 279 (1855)	17
Atchison T & S.C. Ry. v. Buell, _____ U.S. _____, 107 S. Ct. 1410 (1987)	21
Bank of Marin v. England, 385 U.S. 99 (1966)	10
Bennett v. Atchison, T. & S.F. Ry., 187 Iowa 897, 174 N.W. 805, 807 (1919)	16
Briggs v. Pennsylvania R.R., 164 F.2d 21 (2d Cir. 1947), *aff'd*, 334 U.S. 304 (1948)	15
Brown v. Western Railway of Alabama, 338 U.S. 294 (1949)	24,25
Bynum v. Patterson Truck Lines, Inc., 655 F.2d 643 (5th Cir. 1981)	33
Cahill v. New York Haven & Hartford R.R. Co., 351 U.S. 183 (1956)	10
Camplese v. Consolidated Rail Corp., 594 F. Supp. 44 (M.D. Pa. 1984)	16,19
Cannon v. University of Chicago, 441 U.S. 700 (1979)	18
Carver v. Consolidated Rail Corp., 600 F. Supp. 125 (E.D. Pa. 1984)	16,19,28
Charmouche v. Southern Pacific Transp., No. 01-86-0083-CV (Tex. Ct. App. May 21, 1987)	16
Chesapeake & Ohio Rwy. v. Kelly, 241 U.S. 485 (1916)	*passim*

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Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 28
Chicago, M., St. P. & P. R.R. v. Busby, 41 F.2d 617 (9th Cir. 1930) 16
Cox Broadcast Corp. v. Cohn, 420 U.S. 469 (1975) 3
Dahnke-Walker Milling Co. v. Bordurant, 257 U.S. 282 (1921) 2
Dice v. Akron, Canton & Youngstown Co., 342 U.S. 359 (1942) 13,14,25
Dickinson v. Stiles, 246 U.S. 631 (1918) 2
DiSabatino v. National R.D. Passenger Corp., 724 F.2d 394 (3d Cir. 1984) 34
Duplate Corp. v. Triplex Safety Glass Co., 298 U.S. 448 (1936) 28
Earl v. Chesapeake & Ohio Ry., No. 83-3040 (S.D. W. Va. June 26, 1985) 16
Employers' Liability Act Cases, 207 U.S. 463 (1908) 13,18
Faulkenberry v. Louisiana & Arkansas Ry., 551 F.2d 650 (5th Cir. 1977) 15
Felder v. Union Pacific R.R., 660 P.2d 911 (Colo. Ct. App. 1982) 16
Flood v. Kuhn, 407 U.S. 258 (1972) 18
Flournoy v. Wiener, 321 U.S. 253 (1944) 3
Garcia v. Burlington Northern R.R., 597 F. Supp. 1304 (D. Colo. 1984) 16
Garcia v. Burlington Northern R.R., No. 84-1318 (10th Cir. Apr. 22, 1987) 16
General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983) 28
In Re: Griffiths, 413 U.S. 717 (1973) 2
Grow v. Oregon Short Line R.R., 47 Utah 26, 150 P. 970 (1915) 16
Gulf Offshore Co. v. Mobile Oil Corp., 453 U.S. 473 (1981) 27,28

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Halcyon Lines v. Haenn Shop Ceiling Refitting Corp., 342 U.S. 282 (1952) 22
Hanley v. Erie R.R., 81 N.Y.S.2d 100 (1948) 16
Humphries v. Pittsburgh & Lake Erie R.R., 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert. denied*, _____ U.S. _____, 106 S.Ct. 179 (1985) 8,27
Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1971) 2
Jarvis v. Johnson, 688 F.2d 740 (3d Cir. 1982) 24
Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) ..... *passim*
Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980) ..... *passim*
Ketchum v. Boston & M. R.R., 249 App. Div. 901, 292 N.Y.S. 567, 568 (1937) 16
Kozar v. Chesapeake & Ohio Ry., 449 F.2d 1238 (6th Cir. 1971) 15
Laudenburger v. Port Authority of Allegheny County, 463 Pa. 53, 436 A.2d 147 (1981), *appeal dismissed sub nom., Bucheit v. Laudenburger*, 456 U.S. 940 (1982) 24
Laycock v. Parker, 103 Wis. 161, 79 N.W. 327 (1899) 17
Lindsey v. Louisville & Nashville R.R., 775 F.2d 1322 (5th Cir. 1985) 15
Louisiana & Arkansas Ry. v. Pratt, 142 F.2d 847 (5th Cir. 1944) 15,16,17,28
Mahan v. Metro-North Commuter R.R., No. 86 Civ. 0922 (JFK), slip op. at 4 (S.D.N.Y. Mar. 9, 1987).. 16
Melin v. Burlington Northern R.R., 401 N.W.2d 418 (Minn. Ct. App. 1987) 16
Michigan Central R.R. v. Vreeland, 227 U.S. 59 (1913) 21

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Mobile & O. R.R. v. Williams, 219 Ala. 238, 121 So. 722 (1929) 16
Murmann v. New York, N.H. & H. R.R. Co., 258 N.Y. 447, 180 N.E. 114 (1932) 16
Murphy v. Leigh Valley R.R., 63 F. Supp. 928 (E.D.N.Y. 1945), *modified*, 158 F.2d 481 (2d Cir. 1946) 16
Newman v. Grand Trunk Western R. Co., 781 F.2d 55 (6th Cir. 1985) 15
Norfolk & Western Rwy. Co. v. Liepelt, 444 U.S. 490 (1980) 11,14,25,28
Norton v. Erie R.R., 163 A.D. 468, 148 N.Y.S. 771 (1914) 16
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 2
Oliphant v. Suguamish Indian Tribe, 435 U.S. 1919 (1978) 17
Olsen v. Shell Oil Co., 708 F.2d 976 (5th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984) 27
Perez v. Campbell, 402 U.S. 642 (1971) 24
Poleto v. Consolidated Rail Corp., 826 F.2d 1270 (3d Cir. 1987) ..... *passim*
Powers v. New York Central R.R., 251 F.2d 813 (2d Cir. 1958) 15
Prudential Insurance Co. v. Check, 259 U.S. 530 (1922) 3
Rodgers v. United States, 332 U.S. 371 (1947) ... 20,22,23
Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) 28
St. Louis Southwestern Rwy. Co. v. Dickerson, 470 U.S. 409 (1985) ..... *passim*
Second Employer Liability Cases, 223 U.S. 1, 48-49 (1912) 13,18

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Shaw v. Delta Air Lines, 463 U.S. 85 (1983) 23
Sinkler v. Missouri Pacific R. Co., 56 U.S. 326 (1957) 21,22
South Buffalo Ry. v. Ahern, 344 U.S. 367 (1953) 14
Wicks v. Central R.R., 129 N.J. Super. 145, 322 A.2d 488, *cert. denied*, 66 N.J. 317, 317 A.2d 17 (1974) 16
Wildman v. Burlington Northern Railway Co., 825 F.2d 1392 (9th Cir. 1987) 15,28
Wilson v. Burlington Northern R.R. Co., 803 F.2d 563 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1604 (1987) 15,16,17,18

Statutes and Rules.

Pa. R.Civ.P. No. 238 ..... *passim*
28 U.S.C. §1257(2) 2,4
28 U.S.C. §1961 4,8,19,27
35 U.S.C. §284 28
35 U.S.C. §1333(a)(2)(A) 27
35 U.S.C. §1333(a)(3) 27
Federal Employer's Liability Act ("FELA") 45 U.S.C. §51 *et seq.* 2
Outer Continental Shelf Lands Act, 43 U.S.C. §1331-1356 (1986) ("OCSLA") 27
45 U.S.C. §56 4

Page

Other Authorities.

Miller, C., "The Quest For A Federal Workmen's Compensation Law For Railroad Employees" 17 LAW & CONTEMP. PROB. 189 (1953) 13
Miller, V., "An Interpretation of the Act of 1939 (FELA)," 17 LAW & CONTEMPT. PROB. 241 (1953) 18
S. Rep. No. 275, 97th Cong., 2d Sess. 11-12, reprinted in 1982 U.S. Code Cong. & Ad. News 11, 21-22 19
S. Rep. No. 468, 60th Cong., 1st Sess. 3..... 21
Schwartz S., Mahhshigian, L. "The Federal Employer's Liability Act, A Bane For Workers, A Bust For Railroads, A Boon For Lawyers," 23 San Diego L. Rev. 1, 2 (1986) 21,22
49 Cong. Rec. 4513 (March 1, 1913) 22
"Federal Railroad Administration, Certain Railroad Employee Fatalities Investigated by the Federal Railroad Administration Year 1984." REPORT OF THE U.S. DEP'T OF TRANS. (June 1985)... 22

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-1743

MONESSEN SOUTHWESTERN RAILWAY COMPANY,

Appellant,

vs.

GERALD L. MORGAN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR APPELLANT

Opinions and Judgments Below

The Opinion of the Supreme Court of Pennsylvania is reported at _____ Pa. _____, 518 A.2d 1171 (1986), and it and the judgment of that court appear in Appendix A to Appellant's Jurisdictional Statement.

The Opinion of the Superior Court of Pennsylvania is reported at 339 Pa. Super. 466, 489 A.2d 254 (1985), and it and the judgment of that court appear in Appendix B to Appellant's Jurisdictional Statement.

The Opinion of the Court of Common Pleas of Allegheny County is unreported and it and the judgment of that court appear in Appendix C to Appellant's Jurisdictional Statement.

Statement of Jurisdiction

This Court has appellate jurisdiction over this appeal, pursuant to 28 U.S.C. §1257(2), because appellant has drawn into question the validity of a state procedural rule as applied to this Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51 *et seq.*, case on the ground of its being repugnant to the Constitution and laws of the United States, and the state courts have decided in favor of the validity of the state rule as applied. *See Dickinson v. Stiles*, 246 U.S. 631 (1918).

A state court rule such as Pa.R.Civ.P. No. 238 is a state "statute" within the meaning of 28 U.S.C. §1257(2). *See Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978); *In Re: Griffiths*, 413 U.S. 717 (1973). Moreover, the "validity" of the state statute is "sustained" for purposes of appellate review by this Court under 28 U.S.C. §1257(2) where, as here, the state courts hold the statute applicable in the face of a contention that such an application contravenes federal law. *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1971) (and cases cited therein); *Dahnke-Walker Milling Co. v. Bordurant*, 257 U.S. 282, 288-290 (1921). Finally, the Supreme Court of Pennsylvania directly considered and passed on the federal question presented to this Court, concluding that Pa.R.Civ.P. No. 238 does not violate federal law when applied to FELA actions brought in the state courts of Pennsylvania.

This Court's appellate jurisdiction extends as well to the question whether the trial court erred in refusing to instruct the jury that any future damage award must be reduced to present value, in violation of this Court's decisions in *St. Louis Southwestern Railway Co. v. Dickerson*, 470 U.S. 409 (1985), and *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). *See Cox Broadcast Corp. v. Cohn*, 420 U.S. 469, 487 n. 14 (1975) ("In finding we have appellate jurisdiction, we also take jurisdiction over any aspects of the case which would fall solely within our certiorari jurisdiction"); *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Check*, 259 U.S. 530, 547 (1922).

Constitutional Provision and Statutes Involved

The Supremacy Clause of Article VI of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

28 U.S.C. §1257(2) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Pa.R.Civ.P. No. 238, 28 U.S.C. §1961 and 45 U.S.C. §56 are set forth in Appendix E to Appellant's Jurisdictional Statement.[1]

[1] Hereinafter, the designation "Jur. Stat." will be used to refer to the Jurisdictional Statement filed by the MSW in this Court.

Statement of the Case

This FELA action was filed by appellee Gerald L. Morgan in the Court of Common Pleas of Allegheny County, Pennsylvania to recover damages for injuries allegedly sustained by him in the course of his employment with the Monessen Southwestern Railway Company (the "MSW"). (J.A. at 4a-9a).[2] Morgan, who had worked as a "brakeman and conductor" (Tr. at 340),[3] was injured on August 27, 1977 (Tr. at 343). On February 5, 1979—prior to trial—he returned to work as a "radio and supply clerk" (J.A. at 28a), but was paid the hourly rate for an MSW brakeman. (J.A. at 31a-32a; 35a-36a).

At trial, on the issue of damages, Morgan introduced evidence of his salary for the years 1977 through 1981 and the testimony of two co-workers who held brakemen positions at the time of trial. On the basis of his lost wages from the time of his injury until his return to work, and of higher wages paid to his co-workers because of incentives and shift differentials not available to him in his new position, plaintiff contended that his lost wages to the date of trial were "roughly $49,000."[4] (Tr. at 656). He contended, with respect to his claim for impairment of future earning power, that "he could earn $30,000 or more a year" as a railroad trainman (Tr. at 660), instead of the approximately $25,000 per year he made in his clerical position in 1981. (Tr. 656).

At the close of the evidence, the state trial judge ruled, on the basis of the decision of the Supreme Court of Pennsylvania in *Kaczkowski v. Bolubasz*, 491 Pa. 561,

[2] The designation "J.A." refers to the Joint Appendix.

[3] The designation "Tr." refers to the transcript of trial testimony.

[4] Because the MSW as a matter of policy itself pays the hospital and medical bills of its injured railroad workers as they are incurred irrespective of whether the worker files a FELA suit, Morgan had no other out-of-pocket expenses.

421 A.2d 1027 (1980), that she would apply the "total offset" rule of that case as a rule of decision in this FELA case with respect to any award for loss of future earnings and that she would not charge the jury that such an award must be reduced to its present value.[5] (J.A. at 48a-50a). The MSW, which had submitted a requested jury instruction on reduction to present value (J.A. at 68a-69a),[6] excepted to this ruling. (J.A. at 50a, 62a).

[5] Under the "total offset" rule of *Kaczkowski*, the courts of Pennsylvania presume that the future rate of inflation will be equal to the future rate of interest and, because of this so-called "total offset," claims for impairment of future earning power will no longer be reduced to their present value in Pennsylvania.

[6] The instruction requested by the MSW was as follows:

> If the jury should find that the plaintiff is entitled to a verdict, and further find that the evidence in the case establishes a reasonable likelihood of loss of future earnings, then it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.
>
> Under these circumstances, the result is that the plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money which he would not have received until some future date, but for the verdict.
>
> In order to make a reasonable adjustment for the present use, interest free, of money representing a lumpsum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lumpsum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from the total amount of anticipated future loss whatever the amount would be reasonably certain to earn or return if invested at such future rate of interest over such future period of time; and include in the verdict an award for only the present-worth—the reduced amount—of the total anticipated future loss.
>
> As already explained to you, this computation is readily made by using the so-called "present worth" tables which the Court has judicially noticed. (J.A. at 68a-69a).

Thereafter, the jury returned a verdict in favor of plaintiff and against the MSW in the sum of $125,000.00.[7] (J.A. at 64a).

By order dated December 15, 1981, the trial court molded the verdict to add an award of damages for delay pursuant to Pa.R.Civ.P. No. 238. (Jur. Stat. at 36a, 53a-54a). This amount, calculated under Rule 238 at ten percent (10%) per annum, resulted in an additional award of $26,712.50, for a total verdict of $151,712.50. The trial court's order expressly noted an exception to the MSW.[8] (Jur. Stat. at 36a).

The MSW filed post-trial motions which challenged the automatic adoption of the state supreme court's "total offset" rule as a binding rule of decision and the application of Pa.R.Civ.P. No. 238 to this FELA action. (J.A. at 71a-73a, 74a-76a). As to both of these points, the MSW argued that the measure of damages in FELA actions is exclusively a matter of federal law and that the trial court's application of Rule 238 and its refusal to instruct the jury that any award for future lost earnings must be reduced to its present value violated applicable federal law. The MSW's post-trial motions were denied by order dated July 22, 1982. (Jur. Stat. at 37a-38a). Significantly, in attempting to justify its adoption of the "total offset" rule of the state supreme court as a binding

[7] The Court will note that the jury's award was thus equal to the total of plaintiff's claim for lost earnings to the date of trial ($49,000) and approximately 15 years of the $5,000 per year future differential between what he might earn as a railroad brakeman compared with what he might earn as a radio and supply clerk ($75,000), without any reduction to present value. Such an award had been suggested to the jury by counsel for plaintiff in his closing argument. (Tr. 655-57, 659-62).

[8] In the state courts, Morgan suggested that the MSW had failed to preserve its objection to the application of Rule 238. In light of the MSW's exception, both the trial and appellate courts rejected this contention and addressed the issue on its merits.

rule of decision in this FELA case, the trial court relied extensively on the decision of the United States Court of Appeals for the Third Circuit in *Pfeifer*, 678 F.2d 453 (3rd Cir. 1982), (Jur. Stat. at 46a-47a), a decision which was later reversed by this Court. 462 U.S. 523 (1983).

On appeal, a three-judge panel of the Superior Court of Pennsylvania affirmed. (Jur. Stat., App. B). The panel upheld the applicability of Pa.R.Civ.P. No. 238 to an FELA action tried in a Pennsylvania state court on the basis of its earlier decision in *Humphries vs. Pittsburgh & Lake Erie RR.*, 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert. denied*, _____ U.S. _____, 106 S.Ct. 179 (1985). (Jur. Stat. at 26a). In *Humphries*, the Superior Court had held, in an FELA case, that "the allowance of such interest pursuant to Rule 238 comports with our understanding of the federal decisional law on the matter." 476 A.2d at 926. The Superior Court also affirmed the trial court's resolution of the present value issue. (Jur. Stat. at 27a-35a).

The seven-member Supreme Court of Pennsylvania granted the MSW's petition for allowance of appeal. Thereafter, it affirmed, with three justices dissenting. (Jur. Stat., App. A). As had the intermediate appellate court, the state supreme court found the trial court's refusal to give a present value instruction reconcilable with this Court's decision in *Pfeifer*. (*Id.* at 4a-12a). The court also rejected the MSW's contention that the application of Pa.R.Civ.P. No. 238 to this FELA action was repugnant to federal law. (*Id.*, 12a-17a). The court construed federal law, including 28 U.S.C. §1961, to be "permissive" on the matter of prejudgment interest and to allow such an assessment when predicated on state law. Citing Rule 238's purpose of promoting settlement of litigation and the state court's own "right" to

institute measures to alleviate court congestion, the court stated that neither this goal nor the prejudgment interest provisions of Rule 238 contravened federal law. It, therefore, held that Rule 238 "is properly applied to FELA cases brought in Pennsylvania courts." (Jur. Stat. at 17a).

The three dissenting justices disagreed with both rulings. They concluded that the trial judge had not deliberately considered alternative present value methods but had blindly followed the state court's "total offset" method and had refused on the basis of state law to instruct the jury regarding reduction to present value—the very practices condemned by this Court in *Dickerson* and *Pfeifer*. Accordingly, the dissent stated that the damages found by the jury had not been reduced to present value as required by federal law. (*Id.* at 18a-21a).

The dissent also took exception to the majority's ruling on the applicability of Rule 238, finding that the "award of delay damages under Pa.R.C.P. 238 conflicts with federal law." (*Id.* at 21a). Characterizing the majority's attempted justification for applying Rule 238 as "pure sophistry", the dissent concluded:

> "Application of our so-called procedural rule not only interferes with governing federal substantive law but undermines the national uniformity FELA was designed to achieve." (*Id.* at 21a).

The MSW filed a timely appeal to this Court for review of both issues.[9] By order dated October 5, 1987, this Court noted probable jurisdiction over this appeal.

[9] Sometime after the judgment of the Supreme Court of Pennsylvania was entered on December 12, 1986 and before the MSW filed this appeal on February 27, 1987, plaintiff demanded from the MSW's bonding company payment on a supersedeas bond which had been posted pending the appeal in the state courts. Without authorization of the MSW or its parent corporation, Wheeling-Pittsburgh Steel Corporation ("W-P Steel"), both of which were in Reorganization Proceedings under Chapter XI of the Bankruptcy Act, the bonding company paid the amount of the bond, which is less than the amount of the judgment with post-judgment interest. Plaintiff continues to assert a right to proceed against the MSW and W-P Steel for the balance. *See* Motion of Appellee To Dismiss Or Affirm at 5. For their part, the MSW and W-P Steel have demanded that plaintiff and the bonding company return this partial payment. In these circumstances, it is clear, and plaintiff does not dispute, *id.* at 12, that the bonding company's erroneous partial payment to plaintiff, for which the MSW seeks recovery, does not moot this appeal. *See Bank of Marin v. England*, 385 U.S. 99 (1966); *Cahill v. New York Haven & Hartford R.R. Co.*, 351 U.S. 183 (1956).

Summary of Argument

I. It is clear that federal—not state—law must be applied in FELA cases, whether the case is filed in federal or state court, whether the issues involve liability or damages, and whether they are characterized as substantive or procedural. *E.g., St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985); *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980). Accordingly, the Pennsylvania state courts' application of Pa.R.Civ.P. No. 238 to add a substantial award of prejudgment interest to the jury's FELA verdict in this case must be reversed for this reason alone. *See, Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274 (3d Cir. 1987).

Furthermore, an unbroken line of eighty years of federal and state precedent establishes that an award of prejudgment interest in such cases cannot be justified under the FELA and is inconsistent with its legislative history. Nor would such an award be consistent with the congressional purpose and intent of the Act, which reflects a delicate congressional balancing of the interests of railroad workers and their employers, a balancing which would be seriously jarred by judicial allowance of prejudgment interest awards. Finally, the state court judgment in this case constitutes a frontal assault on the nationwide uniformity of the FELA intended by Congress and it has already caused damage awards in FELA cases to be based upon different rules of law in the state and federal courts of Pennsylvania.

II. The Pennsylvania appellate courts also erred in failing to reverse the trial court for its refusal to instruct the jury in this FELA case that any award of future damages must be reduced to its present value by them. A long line of this Court's decisions, from *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916), to *Dickerson, supra*, control this issue and mandated such an instruction. The trial court's action, which was erroneously grounded on state decisional law, must therefore be reversed. Nor does *Jones & Laughlin Steel Corp. v. Pfeifer*, 420 U.S. 469 (1983) justify the judgment of the Supreme Court of Pennsylvania affirming that ruling. The trial court blindly followed state law and did not make any "deliberate choice" of a discount method. Furthermore, *Pfeifer* requires that the "deliberate choice" be made by the trier of fact. Here, the trial court removed that choice entirely from the trier of fact.

ARGUMENT

I. The Pennsylvania State Courts' Application Of Their Own Prejudgment Interest Rule To Increase Substantially The Amount Of The Jury's Verdict In This FELA Case Compels Reversal.

A. Federal Law Controls The Measure Of Damages In FELA Actions.

Since the adoption of the FELA nearly eighty years ago, this Court has consistently emphasized the essential federal character of the Act. *See Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916).[18] This emphasis is of particular importance in light of the concurrent federal and state court jurisdiction conferred by the FELA, 45 U.S.C. §56, and the clear intent of Congress to ensure nationwide uniformity in the rules of liability and recovery for injured railroad workers and their employers. As this Court stated in *Dice v. Akron, Canton and Youngstown Co.*, 342 U.S. 359 (1942):

> "Congress in Section 1 of the [FELA] granted Petitioner a right to recover against his employer for damages negligently inflicted. State laws are not

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[18] The FELA was first enacted in 1906, 34 Stat. 232 (1906), but was held unconstitutional by this Court in *Employers' Liability Act Cases*, 207 U.S. 463 (1908) ("*First Cases*") because it impermissibly sought to regulate intrastate activity. Congress promptly re-enacted the statute in 1908, limiting its application to interstate railroad employees, 35 Stat. 65 (1908), *as amended*, 45 U.S.C. §51-60, and the Act was sustained in *Second Employer Liability Cases*, 223 U.S. 1, 48-49 (1912). ("*Second Cases*"). Although it was generally presumed from the outset that federal and state courts had concurrent jurisdiction over FELA cases, a number of jurisdictional disputes arose in the courts. Accordingly, Congress clarified the FELA in 1910 by specifying that state and federal courts had concurrent jurisdiction. 36 Stat. 291 (1910). *See* Miller, C., "*The Quest For A Federal Workmen's Compensation Law For Railroad Employees*," 17 LAW AND CONTEMP. PROB. 189 (1953).

> controlling in determining what the incidents of this federal right shall be. (Citations omitted). . . . Only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. See *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244, and cases there cited."

342 U.S. at 361.

Because federal law controls, the FELA supersedes "any state law entrenching on the province of the Act." *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 371 (1953).

This Court has always been particularly emphatic in holding that federal statutory and decisional law controls the amount of damages recoverable under the FELA. The basic principle was announced shortly after the Act was passed. "[T]he question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employer's Liability Act, it must be settled according to general principles of law as administered in the Federal courts." *Kelly, supra*, 241 U.S. at 491. On two recent occasions involving FELA cases adjudicated in state courts, this Court has reiterated that FELA damage awards are governed by federal and not state law. "[It] has long been settled that questions concerning the measure of damages in an FELA action are federal in character . . . . This is true even if the action is brought in state court." *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 (1980). *See also St. Louis Southwestern Rwy. v. Dickerson*, 470 U.S. 409, 411 (1985) ["the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law"].

In this case, however, the sole basis for the state trial court's addition of a substantial award of prejudgment interest to the verdict returned by the jury was Pa.R.Civ.P. No. 238. For this reason alone, the judgment of the Supreme Court of Pennsylvania must be reversed. As the United States Court of Appeals for the Third Circuit ruled recently in another FELA case:

> "We note at the outset of our analysis that the availability of interest in an action arising under a federal statute is governed by federal law, not the law of the forum state [citing cases, including *Liepelt, supra*]. Because Poleto's claim against Conrail is predicated upon a violation of a federal statute, state substantive law, *particularly Pennsylvania Rule of Civil Procedure 238*, is not implicated [citing cases]. Any claim to prejudgment interest must therefore be derived from federal statutory sources." (Emphasis supplied). *Poleto, supra*, 826 F.2d at 12.

B. Neither The FELA Nor General Federal Law Authorizes An Award Of Prejudgment Interest In FELA Cases.

Throughout the eighty-year history of the FELA, federal and state courts alike have consistently held that prejudgment interest is not available in FELA actions.[11]

[11] Federal Decisions: *Wildman v. Burlington Northern Railway Co.*, 825 F.2d 1392 (9th Cir. 1987); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987); *Wilson v. Burlington Northern R.R.*, 803 F.2d 563, 566 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1604 (1987); *Newman v. Grand Trunk Western R. Co.*, 781 F.2d 55, 56 (6th Cir. 1985); *Lindsey v. Louisville & Nashville R.R.*, 775 F.2d 1322, 1325 (5th Cir. 1985); *Faulkenberry v. Louisiana & Arkansas Ry.*, 551 F.2d 650, 651 (5th Cir. 1977); *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238, 1244 (6th Cir. 1971); *Powers v. New York Central R.R.*, 251 F.2d 813, 818 (2d Cir. 1958); *Briggs v. Pennsylvania R.R.*, 164 F.2d 21, 22 (2d Cir. 1947), *aff'd*, 334 U.S. 304 (1948); *Louisiana & Arkansas*

(Footnote continued on following page.)

Until the decision of the Pennsylvania courts in this case to apply one of their own rules to augment substantially a jury's verdict in an FELA case, no court had ever held that state law could be applied to increase the amount of a jury's award of damages in such a case. Indeed, all prior decisions—including numerous state court opinions—had uniformly regarded the question as one of federal law which forbade such an award. *See* n.11, *supra*.[12]

(Footnote continued from preceding page.)

Ry. v. Pratt, 142 F.2d 847, 848-49 (5th Cir. 1944); *Chicago, M., St. P. & P. R.R. v. Busby*, 41 F.2d 617, 619 (9th Cir. 1930); *Mahan v. Metro-North Commuter R.R.*, No. 86 Civ. 0922 (JFK), slip op. at 4 (S.D.N.Y. Mar. 9, 1987); *Earl v. Chesapeake & Ohio Ry.*, No. 83-3040, slip op. at 4 (S.D. W. Va. June 26, 1985); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125, 127 (E.D. Pa. 1984); *Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44, 48 (M.D. Pa. 1984); *Murphy v. Leigh Valley R.R.*, 63 F. Supp. 928, 930 (E.D.N.Y. 1945), *modified*, 158 F.2d 481 (2d Cir. 1946).

State Decisions: *Charmouche v. Southern Pacific Transp.*, No. 01-86-0083-CV (Tex. Ct. App. May 21, 1987); *Melin v. Burlington Northern R.R.*, 401 N.W.2d 418, 420 (Minn. Ct. App. 1987); *Felder v. Union Pacific R.R.*, 660 P.2d 911, 914-15 (Colo. Ct. App. 1982); *Wicks v. Central R.R.*, 129 N.J. Super. 145, 322 A.2d 488, 489, *cert. denied*, 66 N.J. 317, 317 A.2d 47 (1974); *Hanley v. Erie R.R.*, 81 N.Y.S.2d 100, 101 (1948); *Ketchum v. Boston & M. R.R.*, 249 App. Div. 901, 292 N.Y.S. 567, 568 (1937); *Murmann v. New York, N.H. & H. R.R. Co.*, 258 N.Y. 447, 180 N.E. 114, 115 (1932); *Mobile & O. R.R. v. Williams*, 219 Ala. 238, 121 So. 722, 731 (1929); *Bennett v. Atchison, T. & S.F. Ry.*, 187 Iowa 897, 174 N.W. 805, 807 (1919); *Grow v. Oregon Short Line R.R.*, 47 Utah 26, 150 P. 970, 971 (1915); *Norton v. Erie R.R.*, 163 A.D. 468, 148 N.Y.S. 771, 772 (1914).

[12] The only other court to allow an award of prejudgment interest in an FELA case was the District Court for the District of Colorado in *Garcia v. Burlington Northern R.R.*, 597 F. Supp. 1304 (D. Colo. 1984). But even that court did not predicate the award on state law. Moreover, the decision was reversed on procedural grounds, *Garcia v. Burlington Northern R.R.*, No. 84-1318 (10th Cir. Apr. 22, 1987), and has been overruled by the Tenth Circuit's ruling that prejudgment interest is not available in FELA actions. *Wilson*, 803 F.2d at 566.

The collective rationale of the cases denying prejudgment interest in FELA actions is simple and compelling: the FELA does not authorize awards of prejudgment interest and such awards should not be added by judicial fiat to legislation which was carefully crafted by Congress to alter the common law applicable to personal injury claims and to balance delicately the interests of railroad workers and their employers. *See, e.g., Wilson*, 803 F.2d at 564 [declining "to imply from certain of Congress' express departures from the common law in 1908 a legislative intention that then equally radical departures be later made by judicial fiat"]. The reasoning set forth by the Court of Appeals for the Fifth Circuit more than forty years ago in a leading case on the issue is representative:

> "The item of accrued interest presents a question of substantive law. We think, therefore, that the silence of the federal statute upon the subject of interest may not be construed as leaving the subject unlegislated upon in the Act, but is indicative of the considered purpose that no interest should be allowed in [FELA] actions prior to verdict."

Louisiana & Arkansas Ry. v. Pratt, 142 F.2d 847, 848-49 (5th Cir. 1944).

As *Pratt* holds, the silence of the FELA on the question of prejudgment interest cannot be regarded as neutral on the issue. In determining legislative intent, it is the contemporaneous historical context that must be considered. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 1919 (1978). At the time that Congress enacted the FELA, the common law uniformly rejected the addition of prejudgment interest on unliquidated amounts. *See generally, Laycock v. Parker*, 103 Wis. 161, 79 N.W. 327 (1899); *Adriance v. Brooks*, 13 Tex. 279 (1855). Thus, it is significant that in drafting the FELA compensation scheme, Congress made radical changes to a number of

other common law rules but did not alter the common law rule against awarding prejudgment interest in personal injury cases.[13] *See Wilson*, 803 F.2d at 565; *see also Poleto*, 826 F.2d at 1278 ["In view of Congress' conscious focus on the manner in which the FELA should differ from the common law, it is not insignificant that Congress failed to abrogate the prejudgment interest principle"].

The silence of the FELA is further instructive when considered against the backdrop of eighty years of precedent and the absence of any congressional initiative to alter the uniform construction of the FELA by the judiciary. Although Congressional inactivity is not conclusive proof of intent, it is significant when the silence is sustained in the face of consistent judicial interpretation. *See e.g., Cannon v. University of Chicago*, 441 U.S. 700, 702-703 (1979); *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972). The statute has been amended on several occasions since its adoption,[14] but at no time has

[13] Among the significant modifications made to common law tort principles in the initial FELA legislation was the abolition of the "fellow servant" rule which had excused the railroad from liability for acts committed by co-employees and the elimination of contributory negligence as a total bar to recovery by the injured employee. In addition, the FELA abolished the assumption of risk defense in cases involving violations of employer safety statutes. The radical nature of the FELA's departure from these common law principles cannot be underestimated. "Some lawyers in 1908 were prepared to argue that judge-made concepts like fellow-servant, contributory negligence, and fault are comparable to dogmatic truths." Miller, V., "*An Interpretation of the Act of 1939 (FELA)*" 17 LAW AND CONTEMP. PROB. 241 (1953); *see also First Cases*, 207 U.S. at 484-485; *Second Cases*, 223 U.S. at 41 (arguments of railroad counsel).

[14] Following the FELA's re-enactment in 1908 and passage of the clarifying amendment with respect to concurrent jurisdiction, *see n. 6 supra*, additional amendments were enacted in 1911, c.231, §291, 36 Stat. 167, in 1939, c. 685, 53 Stat. 1404, and in 1948, c. 646, 62 Stat. 989. The 1939 Amendments, among other things, eliminated the assumption of risk defense for all cases and extended the limitations period to three years.

Congress amended it to authorize awards of prejudgment interest; nor has Congress acted to alter the firmly established federal character of the FELA in general and of damage awards in particular.[15]

The application by the Pennsylvania courts of their own prejudgment interest rule to this FELA action, therefore, stands alone against all authority. Other courts, both federal and state, have respected the essential federal character of the FELA and have refused to apply state prejudgment interest provisions or to award prejudgment interest in general. For eighty years, Congress has at least implicitly concurred in that interpretation. The decision of the Pennsylvania courts in this case constitutes an unprecedented challenge to the federal character of the FELA.

The decision in the case at bar also thwarts the goal of nationwide uniformity which was one of the principal purposes of Congress in enacting the FELA. Thus, within Pennsylvania alone, two federal district courts and, just recently, the Court of Appeals for the Third Circuit, have ruled that Pa.R.Civ.P. No. 238 cannot be applied to augment a jury's award in an FELA case.[16] But under the decision of the Supreme Court of

[15] The only relevant congressional activity in this regard has been a rejection of prejudgment interest in general. When Congress passed the Federal Court Improvement Acts of 1982, Pub.L. 97-164, 96 Stat. 25, it considered an amendment to 28 U.S.C. §1961 that would have authorized prejudgment interest but omitted the proposal from the final enactment. *See* S. Rep. No. 275, 97th Cong., 2d Sess. 11-12, reprinted in 1982 U.S. Code Cong.& Ad. News 11, 21-22.

[16] *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987); *Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44 (M.D. Pa. 1984); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125 (E.D. Pa. 1984).

Pennsylvania in this case, the state trial courts are obliged to apply Rule 238 substantially to augment jury awards in FELA cases with a further award of prejudgment interest.

Thus, in the face of the congressional goal of nationwide uniformity, because of the decision in this case, FELA litigants in the federal and state courts of Pennsylvania who are situate within the very same city do not even have the same law applied to their claims. Such discriminatory treatment, frustration of congressional intent and incentive to forum shopping cannot be countenanced and compels reversal of the judgment of the Pennsylvania courts in this case.

C. Nor Would It Be Consistent With The Congressional Purposes Of The FELA For The Courts To Augment FELA Verdicts With Awards Of Prejudgment Interest.

In the face of the legislative history of the FELA and some eighty years of judicial precedent denying any right to prejudgment interest under it, the fact that the statute does not expressly forbid such an award does not argue strongly in favor of such awards. As this Court held in *Rodgers v. United States*, 332 U.S. 371 (1947), if a federal statute is silent on the question of prejudgment interest, the intent and purposes of the legislation must be examined and an award of prejudgment interest is appropriate only if it would be consistent with the congressional purpose underlying the Act. A "persuasive consideration" in this determination "is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed." *Id.* at 373.

In the case of the FELA, the analysis of the legislative history discussed above shows that an award of prejudgment interest cannot be reconciled with the

delicately balanced compensation scheme established by the Act and the absence of any provision for such an award therein. Congress sought by the provisions it selected and the changes it made to the common law to balance the equities and define the relationship between railroads and their workers. *See Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1957) ("The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier.")[17] Invoking the goal of "liberal recovery" as a guide in the construction of existing FELA provisions is one step. *See, e.g., Sinkler*, 356 U.S. at 325-326 [giving the word "agent" an "accommodating scope" to effectuate purposes of Act]; *Atchison T & S.C. Ry. v. Buell*, _____ U.S. _____, 107 S.Ct. 1410 (1987) [referring to "standard of liberal construction in order to accomplish [Congress'] objects"]. It is entirely inappropriate, however, to employ that rationale as a device to insert otherwise absent provisions and expand the compensation scheme beyond that contemplated by Congress when it enacted the FELA. *See Michigan Central R.R. v. Vreeland*, 227 U.S. 59 (1913) [declining to alter common law rule that right of action for injury to person is extinguished by death because there is no provision for survival of action in FELA].[18]

[17] As the Court in *Sinkler*, 356 U.S. at 329-330, also noted, "The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting *'the welfare of both employer and employee*, by adjusting the losses and injuries inseparable from industry and commerce. . . .'" (quoting S. Rep. No. 468, 60th Cong., 1st Sess. 3) (emphasis added).

[18] Other major purposes behind the enactment of the FELA included the improvement of railroad worker safety and a need to calm labor unrest related to the high injury and fatality rate among railroad workers at the turn of the century. *See Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329 (1957); Schwartz S., Mahhshigian, L.,

(Footnote continued on following page.)

Finally, it cannot be overemphasized that, as enacted, "[t]he FELA represented a radical change from the common law in an attempt to assure workers a more sure recovery by abolishing many traditional defenses." *Poleto*, 826 F.2d at 1278. Having provided "a more sure recovery" to railroad workers, it is by no means evident that this principle of "liberal recovery" warrants a further expansion of the recovery beyond that allowed by the Act or by the common law from which the FELA was derived. Such judicial "tinkering" with the recovery equation established by Congress is wholly unwarranted in light of the fact that the FELA was passed, not to afford an unbridled "liberal recovery", but "to adjust the expense [of railroading] equitably between the worker and the carrier." *Sinkler, supra*, 356 U.S. at 329.[19]

(Footnote continued from preceding page.)

"The Federal Employer's Liability Act, A Bane for Workers, a Bust For Railroads, a Boon for Lawyers," 23 San Diego L. Rev. 1, 2 (1986); *See also* 49 Cong. Rec. 4513 (Mar. 1, 1913) (setting forth statistics of railroad worker fatalities and injuries for years 1888-1908). Neither of the FELA's goals of improving safety or labor relations compel awards of prejudgment interest; nor is the attainment of either frustrated by their absence. In fact, railroad safety has advanced considerably since the FELA's enactment without the inclusion of prejudgment interest in the damage awards. For example, in 1907 there were more than 4500 railroad employees killed; in 1984, the number was 40. *See Federal Railroad Administration, Certain Railroad Employee Fatalities Investigated by the Federal Railroad Administration Year 1984*, REPORT OF THE U.S. DEP'T OF TRANS. (June 1985).

[19] That Congress has made the equitable adjustment in the FELA further militates against awards of prejudgment interest under this Court's *Rodgers* analysis. Where Congress itself balances the "relative equities" found to be a "persuasive consideration" in *Rodgers* and the resulting legislation makes no allowance for prejudgment interest, it is not the province of the courts to reassess the equities and reverse Congress' determination. *See Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) (declining to allow contribution because it might be inconsistent with balance struck by Congress in Longshoremen's and Harbor Worker's Compensation Act).

D. The Pennsylvania Courts' Erroneous Application Of Pennsylvania Rule 238 Is Contrary To Fundamental Principles Of Federal Preemption.

The divergence of the Pennsylvania courts from the long line of unanimous federal and state authority and their failure to adhere to the analysis dictated by this Court in *Rodgers* is caused by a fundamental misapprehension of the operation and effects of preemptive federal law. In seeking to justify its determination that its Rule 238 could be applied to this FELA case, the majority opinion of the Pennsylvania Supreme Court referred to the fundamental goal of Rule 238 of prompting meaningful negotiations so as to unclutter the courts and stated:

> "This worthy goal in no manner conflicts with the purposes of the FELA, nor do the prejudgment interest provisions of Rule 238 contravene any provision of the federal act. This Court has the right to institute procedural rules designed to alleviate congestion in the trial courts. Cases brought under the FELA, as well as other federal statutes, contribute to such congestion the same as cases instituted under state laws. A rule of procedure, such as Rule 238, which does not conflict with any provision of the FELA is properly applied for FELA cases brought in Pennsylvania courts." (Jur. Stat. at 16a-17a).[20]

This focus on the purposes and effects of the state provision when addressing a question of federal preemption is misdirected. Preemptions turns, not on the nature, purposes or judicial interpretations of state law, but on the intent and purposes of Congress in enacting the federal legislation. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 95 (1983). The character of the state law or rule

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[20] The Pennsylvania Supreme Court also stated that "the purpose and effect of Rule 238 are procedural. . . ." (Jur. Stat. at 17a, n.4).

at issue is not germane. The core inquiry is whether the state provision, however characterized, interferes with the purposes and goals of the preemptive federal law. *See Perez v. Campbell*, 402 U.S. 642, 650-653 (1971) [examine effects not purposes of state law]. Here, where the decision under review applies state law to federal legislation intended to be uniform, the conflict is obvious.

Moreover, the conflict created by applying Rule 238 to FELA actions is not salvaged by the Pennsylvania courts' characterization of the state rule as procedural. First, this characterization is at odds with those courts' own interpretations of the Rule. In *Laudenberger v. Port Authority of Allegheny County*, 436 Pa. 53, 436 A.2d 147 (1981), *appeal dismissed sub nom., Bucheit v. Laudenberger*, 456 U.S. 940 (1982), the Pennsylvania Supreme Court itself acknowledged that, because of the effect of Rule 238 on damage recoveries, it had "substantive elements" which "touch upon substantive rights of both parties." *See* 436 A.2d at 155.[21] Moreover, in *Jarvis v. Johnson*, 688 F.2d 740 (3d Cir. 1982), the Court of Appeals for the Third Circuit held Rule 238 to be substantive and therefore applicable to diversity cases commenced in federal court.

The Pennsylvania courts' characterization of Rule 238 as "procedural" is further and more fundamentally flawed, however, because even state procedural rules must yield to conflicting federal law. In *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949), for example, this Court held in an FELA case brought in

[21] Justice Roberts dissented in *Laudenberger* on the ground that Rule 238 was undeniably "substantive" and therefore beyond the rule-making authority of the Pennsylvania Supreme Court. As Justice Roberts stated: "Even a most casual reading makes clear that Rule 238 increases the relief available to a plaintiff by mandating the deprivation of a defendant's property." 436 A.2d at 158.

state court that pleading requirements imposed by state procedural law could not be applied to interfere with the federally defined substantive rights at issue. The Court stated, 338 U.S. at 298-99:

> "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springes the State may set for those endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' [citations omitted]. Should this court fail to protect federally created rights from dismissal because of overexacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."

See also, Norfolk & Western Ry. v. Liepelt, 444 U.S. 490, 495 (1980) (Blackmun, J. dissenting) ("I agree, of course, that state rules that interfere with federal policy are to be rejected even if they might be characterized as 'procedural' ").[22] And, as Justice Hutchinson wrote for the three dissenting justices on the Supreme Court of Pennsylvania in this case:

> "Likewise, I believe that the trial court's award of delay damages under Pa.R.C.P. 238 conflicts with federal law. Though state procedure generally applies in FELA cases brought in state courts, "so

[22] Application of state "procedural" rules to FELA actions tried in state courts was similarly rejected in *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952). In *Dice*, the state court of Ohio concluded that the Ohio procedure of having the court rather than the jury determine the validity of a release should apply to FELA actions. This Court reversed, holding that the issue was one of federal rather than state law, that the rule must be uniform in FELA cases and that, because a jury trial was part of the remedy under the FELA, the validity of a release must be determined by the jury without regard to local practice.

called" procedural rules which interfere with federal substantive law do not. *Brown v. Western Railroad of Alabama*, 338 U.S. 294 (1949). Damages, of course, are a matter of federal substantive law. The majority states that Rule 238 is nothing more than a procedural device used to encourage negotiation and settlement and lighten court dockets. This is pure sophistry. Any rule which increases a damage award by twenty-five percent has an undeniably material effect on damages. Application of our so-called procedural rules not only interferes with governing federal substantive law but undermines the national uniformity FELA was designed to achieve. *See Liepelt, supra* at 493 n. 5. Appellee's entitlement to delay damages or prejudgment interest should be determined under federal substantive law not Pennsylvania procedure." (Jur. Stat. at 21a).

Accordingly, it is of no consequence to the present appeal that Pennsylvania Rule 238 was adopted for the otherwise valid purpose of alleviating congestion in the Pennsylvania trial courts. (*See* Jur. Stat. at 16a). *See also, Poleto, supra*, 826 F.2d at 1277, n.11 [rejecting prejudgment interest under the FELA as a means of curbing litigation delay, finding no attempt to rectify such delays as a goal of the FELA]. The award of prejudgment interest pursuant to state law, whatever its purpose, violates the federal compensation scheme designed by Congress in the FELA and destroys the uniformity that statute was intended to achieve. As a result, any application of Rule 238 to FELA actions is inconsistent with the preemptive federal law which governs such actions.

The Pennsylvania Supreme Court also sought to justify the state trial judge's award of prejudgment interest under Rule 238 by borrowing the reasoning offered by the Pennsylvania Superior Court in

Humphries v. Pittsburgh & Lake Erie Railroad Co., 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert. denied*, _____ U.S. _____, 106 S.Ct. 179 (1985). This alternative justification is based on *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984), a non-FELA case in which the Court of Appeals for the Fifth Circuit construed the Outer Continental Shelf Lands Act, 43 U.S.C. §1331-1356 (1986) ("OCSLA"). The Pennsylvania courts' reliance on *Olsen*, however, was misplaced.

The issue in *Olsen* was whether a state prejudgment interest provision should be applied when the federal statute in question *expressly* incorporates state law, but 28 U.S.C. §1961, the general federal interest statute, is silent on the question of prejudgment interest.[23] The Fifth Circuit, reading 28 U.S.C. §1961 as neutral on the subject, followed the state law directive of the OCSLA and, on that basis, found application of the state prejudgment interest rule consistent with the federal legislation. *See* 708 F.2d at 984. In contrast to the OCSLA, the FELA does not incorporate state law—to the contrary, it was designed as a complete substitute for state common law. Under the FELA, federal law controls and, considering the Act's goal of uniformity, there is no room in the FELA, as there is in the OCSLA, for application of state prejudgment interest rules. This Court has in fact recognized these fundamental differences between the OCSLA and the FELA. *See Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 487 (1981) [". . . in OCSLA Congress borrowed a remedy provided by state law and thereby 'specifically rejected national

[23] The OCSLA provides, 35 U.S.C. §1333(a)(2)(A): "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary . . ., the civil and criminal laws of each adjacent state . . . are hereby declared to be the law of the United States. . . ." *See also* 35 U.S.C. §1333(a)(3) (referring to "adoption of state law as the law of the United States").

uniformity' as a paramount goal."] (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971)); *see also Rodrique v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969).[24] Thus, contrary to the Pennsylvania court's conclusion, *Olsen* does not depart from the basic rationale of *Pratt*, *supra*, and the numerous other decisions that FELA's silence on prejudgment interest reflects an intent to disallow the award. *See Carver v. Consolidated Rail Corp.*, *supra*, 600 F. Supp. at, 127 [drawing distinction between OCSLA and FELA].[25]

Thus, Pennsylvania Rule 238 cannot operate in FELA cases because its application is contrary to the federal law which controls such cases. In enacting the FELA, Congress supplanted state law in favor of a uniform body of federal law which equitably balances the relationship between railroads and their workers. Inconsistent state law provisions are inimical to the statutory scheme and goals of the FELA. This inconsistency is not excused by the purposes or "procedural" characterizations of the state rule.

[24] In *Gulf Offshore Co.*, this Court expressly concluded that its ruling in *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), regarding instructions on income tax treatment of future loss awards in FELA cases was not applicable to cases arising under OCSLA if relevant state law governed the matter. Consequently, interpretations of the OCSLA are of no value in construing the FELA because the OCSLA has a predisposition toward state law that is totally absent from the FELA.

[25] This Court's decision in *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983), is also distinguishable. There, although awards of prejudgment interest were found appropriate under patent laws to afford infringed patent owners "complete compensation", the statutory provision under review specifically provided for recovery of interest, 35 U.S.C. §284. The FELA, by contrast, does not. It is also noteworthy in this regard that prior to the adoption of Section 284 in 1946, the statute made no reference to interest and this Court held that common law standards regarding prejudgment interest governed. *See, e.g., Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448 (1936). *See also Wildman*, *supra*, 825 F.2d at 1396 [rejecting reliance on *Devex* in finding no prejudgment interest available under FELA].

II. The Trial Court's Refusal On The Basis Of State Decisional Law To Instruct The Jury On Reduction To Present Value Constitutes Reversible Error Under This Court's Decisions In *Dickerson*, *Kelly* And *Pfeifer*.

The Pennsylvania courts further erred in affirming the trial court's refusal to instruct the jury that any award for loss of future earnings must be reduced to present value. In dispensing with the present value instruction, the trial court looked in this case not to federal law but to state decisional law, and in particular to the Pennsylvania Supreme Court's decision in *Kaczkowski v. Bolubasz*, 491 Pa. 56, 421 A.2d 1027, 1039 (1980). However, long-standing precedent of this Court—stretching from the earliest days of the FELA to the present—holds that the jury must be instructed that any award for future losses must as a matter of federal substantive law be reduced to present value. Thus, as with their application of Pa.R.Civ.P. No. 238, the Pennsylvania courts ignored the applicable federal law and impermissibly predicated a ruling regarding FELA damages on state law.

This Court's recent decision in *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985), controls this issue. In *Dickerson*, this Court confronted a Missouri state court which, like the trial court in this case, declined to instruct the jury in an FELA action that any award of future earnings must be reduced to present worth. Supporting the trial court's action were two Missouri Supreme Court decisions which held that a present value instruction was not necessary in FELA actions because it was not called for in the approved Missouri jury instructions. Flatly rejecting this reliance on state law for the measure of damages in an FELA action, the unanimous *per curiam* opinion of this Court

reiterated two well-established principles of FELA jurisprudence: (1) that "[w]hether such an instruction [on present value] should have been given is a federal question"; and (2) "[n]ot only is it a federal question, but it is also one to which existing law provides a clear answer." 470 U.S. at 411.

The Court found that the "clear answer" was provided more than 70 years ago by its decision in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). In *Kelly*, this Court ruled that a defendant in an FELA case is entitled to have the jury instructed that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only." *Id.* at 491. The *Dickerson* Court, recognizing that it has never disapproved of *Kelly* or its rationale, found that the Missouri court's refusal to instruct FELA juries on present value was at odds with federal law and therefore constituted reversible error.

Like the trial court in *Dickerson*, the trial court in the present case refused to instruct the jury that any award of future damages must be reduced to present value. In refusing that instruction, the court relied upon the state law rule for measuring damages that was announced in *Kaczkowski v. Bolubasz*. Specifically, the trial court instructed the jury as follows:

> Now, it used to be that in these cases the Court would instruct the jury that any moneys that would be awarded to the plaintiff would be reduced to something called present worth. The law now provides that there need not be such a reduction and that the jury, however, is not to consider the inflation rate in arriving at an appropriate figure in the way of damages. By the result of a court decision, the inflation rate and present worth have been equated with each other; and you need not make any adjustment in your verdict for either of those two factors. (Tr. 701-02).

As *Dickerson* makes clear, however, the propriety of jury instructions on damages in FELA cases is a federal question and federal law mandates an instruction on reduction to present value. 470 U.S. at 410. It is reversible error to refuse such an instruction in reliance on state law.[28]

Both Pennsylvania appellate courts in this case sought to justify the trial court's refusal to instruct the jury on the reduction of a future damage award to its present value on the basis of this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 522 (1983). Such reliance is wholly misplaced. In *Pfeifer*, a case decided under the Longshoremen's and Harbor Worker's Compensation Act (the "LHWCA"), this Court reversed a decision of the Court of Appeals for the Third Circuit that the "total offset" method adopted by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz* could be automatically applied to cases arising under the LHWCA.[27] Rather, this Court held, first, on the basis of its decision in *Kelly*, *supra*, that "in all cases where it is

[28] The Pennsylvania Supreme Court's selection of the total offset method in *Kaczkowski v. Bolubasz* is in fact an express rejection of this Court's holding in *Kelly*. In holding that reduction to present value by historical discount methods was no longer acceptable under Pennsylvania law, the Pennsylvania Supreme Court noted that "[t]he origin of this principle is *Chesapeake v. Ohio RW Co. v. Kelly*. . . ." 421 A.2d at 1030 n.10. The Court then declared *Kelly*'s approach outdated, stating that "an economic lag of judicial practice occurs when courts perpetuate a 1916 rationale to the economic realities of the 1900's." *Id.* This reasoning further demonstrates the inapplicability of *Kaczkowski* as a matter of general state law to FELA actions. In contrast to the Pennsylvania Supreme Court's view of *Kelly*, this Court has repeatedly reaffirmed the principle of *Kelly* and, in *Dickerson*, recently declared its continued applicability to FELA cases.

[27] In denying MSW's post-trial motions, the trial court relied upon the Third Circuit's decision in *Pfeifer*, prior to its reversal by this Court. (Jur. Stat. at 46a-47a).

reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits are to be discounted in the making up of the award," 462 U.S. at 537 (quoting *Kelly*, 241 U.S. at 490), and, second, that in making that discount, the trier of fact "must make a deliberate choice, rather than assuming it is bound by a rule of state law." 462 U.S. at 553.

In seeking to justify the trial court's refusal to instruct the jury on reduction to present worth, the Pennsylvania appellate courts purported to apply this Court's *Pfeifer* decision by finding that the trial court had made a "deliberate choice" of the total offset method. The record in this case supports that suggestion. The instruction actually given the jury quoted at 31, *supra*, as well as the trial court's pre-charge rulings in chambers, unambiguously demonstrate her reliance on state decisional law as the basis for her refusal to give an instruction on present value.[19] As Justice Hutchinson (who is now a member of the Court of Appeals for the Third Circuit) wrote for the dissenters in this case:

> "Judge Finkelhor's comments reveal that she did not consider other methods, but blindly followed our teaching in *Bolubasz* and that she disagrees with the concept of discounting to present value required by federal law. In addition, her reliance on *Liepelt* seems misplaced in light of the subsequent decisions in *Dickerson* and *Pfeifer*. A state judge is not free to consider the discounting question procedural in FELA cases because the United States Supreme Court has held it is substantive. *Liepelt, supra; Kelly, supra*. The damages found by the jury were not reduced to present value as required by federal law." (Jur. Stat. at 20a-21a).

[19] Judge Finkelhor's rulings in chambers on the issue of present worth included the following: "We have reached the decision not to give the present-worth charge; and the basis for the Court's decision is the *Bolubasz* Decision and the opinion of Justice Nix." (Tr. at 577).

Additionally, the Pennsylvania appellate courts erred in concluding that *Pfeifer* controls this issue and that a refusal to provide the jury with a present worth instruction can be justified in this FELA case on the basis of *Pfeifer*. As previously stated, *Pfeifer* arose under Section 5(b) of the LHWCA. Under that Section, jury trials are not available and it is the court, not a jury, which is the trier of fact. *See Bynum v. Patterson Truck Lines, Inc.*, 655 F.2d 643, 644 (5th Cir. 1981). Accordingly, in *Pfeifer*, this Court considered whether a trial court, *acting as the finder of fact*, could predicate its reduction of its future damage award to present value on the basis of state decisional law. *See* 462 U.S. at 547 ("We limit our attention to suits under §5(b) of the Act. . . ."). The Court concluded that such reliance was inappropriate and that the trier of fact must make a "deliberate choice" of the method by which to reduce any awards of future losses to present value.[20]

In this FELA action, as in most FELA actions, it was the jury which was the trier of fact and this Court has long held that in such cases the appropriate measure of damages is a matter to be determined by the trier of fact. *See Kelly*, 241 U.S. at 492. *Pfeifer*, therefore, cannot be applied to justify the trial court's actions in this case. Here, the trial court instructed the jury (*i.e.*, the trier of fact) that there was no need whatsoever to reduce any award of future losses to its present value. This was clear error under *Dickerson* and *Kelly*.

[20] This Court's opinion in *Pfeifer* is replete with references to the "trier of fact." *See, e.g.*, 462 U.S. at 536, 538, 547, 550 n.32. It is therefore abundantly clear that the Court contemplated the deliberate choice being made by the trier of fact.

Nor is the trial court's refusal supportable on the ground that the MSW had failed to offer any evidence on an appropriate present value method.[30] First, *Kelly* and *Dickerson* hold that the railroad is entitled as a matter of law to a present value instruction without any need for an evidentiary predicate. Second, the plaintiff in an FELA case—as in any other personal injury case—has the burden of proving his damages and a defendant is under no obligation affirmatively to present evidence on damages in general or on present value methods in particular.[31] Third, the MSW fulfilled whatever burden it had on this issue by requesting that the jury be instructed on reduction to present worth and that it use the present worth tables referred to in the requested instruction.[32]

In sum, the rationale used by the Pennsylvania appellate courts on this issue serves only to cover up the trial court's basic error in refusing to instruct the jury that any award of future damages must be reduced to its present value. *Kelly* and *Dickerson* mandate such instructions and state law affords no excuse for ignoring that mandate. This Court's decision under the LHWCA in *Pfeifer*, which requires a "deliberate choice" by the trier of fact, cannot be applied to justify a complete refusal to instruct the jury on present worth in an FELA case. Furthermore, the jury's award for impairment of future earning power in this case ($75,000) comprised 60% of its $125,000 award. Hence, the trial court's error compels reversal by this Court.

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[30] The Pennsylvania Superior Court offered this rationale in support of its decision (Jur. Stat. 35a), although it was not expressly adopted in the Pennsylvania Supreme Court's opinion.

[31] See *DiSabatino v. National R.D. Passenger Corp.*, 724 F.2d 394, 396 (3d Cir. 1984) (holding in an FELA case that the defendant railroad had "no such burden").

[32] The instruction requested by the MSW referred to " 'present worth' tables which the Court has judicially noted." (J.A. at 69a).

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of Pennsylvania should be reversed and the cause remanded for further proceedings in accordance with this Court's opinion.

Respectfully submitted,

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APPELLEE'S

BRIEF

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IN THE

Supreme Court of the United States

October Term, 1986

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

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EDITOR'S NOTE

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Questions Presented

1. Whether a state rule of civil procedure promulgated to alleviate congestion and reduce delay in all bodily injury, death and property damage actions brought in the state's courts by awarding pre-verdict interest in only those cases where the defendant does not make a written offer of settlement within 80% of the verdict may be applied to an action brought in the state court pursuant to the Federal Employers' Liability Act (FELA)?

2. Whether the state courts in this FELA case could and did properly apply the total offset rule to reduce an award for impairment of earning capacity to present value?

3. Whether a new trial is warranted in this FELA action where the total offset method was used to reduce the claim for future earnings losses to present worth, the defendant offered no evidence for use of an alternative method and the evidence and the verdict demonstrate that whatever method was used, the effect is *de minimis*?

4. If a new trial is ordered, whether it should be limited to the question of damages?

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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-1743

MONESSEN SOUTHWESTERN RAILWAY COMPANY,

Appellant,

vs.

GERALD L. MORGAN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR APPELLEE

Statement of the Case

This action was brought pursuant to the Federal Employers' Liability Act (FELA), *as amended*, 45 U.S.C. §51, *et seq.*, in the Court of Common Pleas of Allegheny County for damages resulting from a permanent back injury suffered by the appellee, Gerald L. Morgan, on August 27, 1977, in the course of Mr. Morgan's employment as a railroad trainman with the appellant, Monessen Southwestern Railway Company (hereinafter referred to as "MSW"). At the time of his injury, Mr. Morgan was 46 years old.[1]

[1] He was 50 years old at the time of trial (J.A. 61a).

Prior to the trial of the case, Mr. Morgan returned to work as a turn foreman for MSW at a rate of pay equivalent to what he would have earned as a trainman (J.A. 28a, 35a-36a, 38a, 39a-41a). He also continued to share in employee incentive programs, and his pension rights remained unchanged (J.A. 39a-41a, 47a-48a). At trial, counsel for MSW argued that Mr. Morgan's future losses would be insignificant because he would continue to work in the future as a turn foreman, receiving the same compensation as a trainman (J.A. 58a-59a).

The trial court instructed the jury on the total offset method for reduction to present worth of damages for impairment of earning capacity (J.A. 61a). On December 4, 1981, the jury returned its verdict in favor of Mr. Morgan in the amount of $125,000.00 (J.A. 64a). By Order of Court dated December 15, 1981, the trial court molded the verdict pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure, adding to the amount of the verdict the sum of $26,712.50 as pre-verdict interest, for a total verdict of $152,712.50. (Jurisdictional Statement, Appendix C, p. 36a).

MSW filed post-trial motions, contending that the assessment of pre-trial interest is not proper in an FELA case and that the total offset method for determining damages for the impairment of future earning capacity is not applicable to FELA cases. In its opinion dated July 22, 1982, the trial court rejected MSW's arguments. (Jurisdictional Statement, Appendix C, pp. 39a-50a). While noting that substantive matters in an FELA case are to be decided pursuant to federal law, the court determined that Rule 238 was a state procedural rule, promulgated by the Supreme Court of Pennsylvania to create an impetus for early, meaningful settlement negotiations in order to reduce delays and congestion in

the Pennsylvania courts. In support of its decision, the trial court cited *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 436 A.2d 147 (1981), *appeal dismissed, sub nom., Bucheit v. Laudenberger*, 456 U.S. 940 (1982), in which the Supreme Court of Pennsylvania held that its promulgation of Rule 238 was a valid exercise of its authority to make rules governing practice and procedure in Pennsylvania state courts.

Recognizing that the elements of damages in an FELA action are governed by federal law, the trial court held that the total offset method of reducing damages for impairment of earning capacity to present worth, as set forth in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), could properly be applied in the case *sub judice*. The court noted that "the traditional present worth-inflationary factor approach resulted in pure speculation." (Jurisdictional Statement, Appendix C, p. 46a). Accepting the rationale for the offset method as explained by the Supreme Court of Pennsylvania in *Kaczkowski*, the trial court found that application of the method was appropriate in the case before it because "when all of these factors are considered, there is a cancelling out of the inflationary spiral and interest derived from damage payments and it is not necessary to belabor the jury." (Jurisdictional Statement, Appendix C, p. 46a).

On appeal, the Superior Court of Pennsylvania affirmed the trial court's decision, in an Order and Opinion dated March 8, 1985. (Jurisdictional Statement, Appendix B, pp. 23a-35a). In holding that the trial court's addition of pre-verdict interest in an FELA case was proper, the Superior Court found that its decision in *Humphries v. Pittsburgh & Lake Erie Railroad Company*, 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert.*

denied, 474 U.S. 863 (1985), was controlling. In *Humphries*, the court had held that an award of Rule 238 pre-verdict interest in an FELA case brought in state court was not inconsistent with federal law.

The Superior Court of Pennsylvania, recognizing that the trial court's ruling preceded this Court's opinion in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S. Ct. 2541 (1983) requiring selection of a particular method for reduction to present worth, analyzed this case in light of the *Pfeifer* decision and determined that the trial court's application of the offset method was appropriate. In doing so, the Superior Court concluded that this Court permitted the use of the total offset method following a conscious, reasoned choice among approved methods. In addition, the Superior Court noted that MSW failed to present evidence that would have supported any other method to be used for reduction to present worth.

The Supreme Court of Pennsylvania granted MSW's petition for allowance of an appeal and affirmed the decision of the Superior Court in a Judgment and Opinion dated December 12, 1986. (Jurisdictional Statement, Appendix A, pp. 1a-22a).[2]

The Pennsylvania Supreme Court concluded that the trial court's application of the offset rule in an FELA case satisfied "the requirements of federal law as enunciated in *Pfeifer*." (Jurisdictional Statement, Appendix A, p. 10a). The Supreme Court also determined, on the basis of the Superior Court's decision

[2] On April 16, 1985, after requesting the appeal, MSW filed a petition for reorganization which is pending at Docket No. 85-0779 in the United States Bankruptcy Court for the Western District of Pennsylvania.

in *Humphries, supra*, that Rule 238 pre-verdict interest, as applied to an FELA case, did not contravene federal law. In so holding, the court noted that the goal of Rule 238 was to promote "meaningful negotiations in major cases so as to unclutter the courts." (Jurisdictional Statement, Appendix C, p. 16a, quoting *Laudenberger, supra.*) The court went on to say that

> [t]his worthy goal in no manner conflicts with the purpose of the FELA, nor do the prejudgment interest provisions of Rule 238 contravene any provision of the federal act. This Court has the right to institute procedural rules designed to alleviate congestion in the trial courts. Cases brought under the FELA, as well as other federal statutes, contribute to such congestion the same as cases instituted under state laws. A rule of procedure, such as Rule 238, which does not conflict with any provision of the FELA is properly applied to FELA cases brought in Pennsylvania courts.

(Jurisdictional Statement, Appendix C, pp. 16a-17a, footnotes omitted).

On February 27, 1987, MSW filed this appeal and on October 5, 1987, this Court noted probable jurisdiction.

Summary of Argument

Pennsylvania Rule of Civil Procedure No. 238 is a validly promulgated procedural rule which has been applied according to its conditions to all cases brought in Pennsylvania state courts for the purposes of encouraging settlements and alleviating congestion of state court dockets by awarding prejudgment interest as damages for delay. Rule 238 should be applicable to FELA cases brought in state court, since those cases also contribute to court congestion.

Neither the FELA nor general federal law prohibits the addition of prejudgment interest to a jury award. Moreover, application of Rule 238 to FELA actions furthers the legislative intent underlying the FELA by providing injured workers with full and speedy compensation. The field of pre-verdict interest has not been preempted by federal law and such interest is not inconsistent with the provisions of the FELA. Rule 238 and the statute can and should be construed as being consistent with each other. Accordingly, the application of Rule 238 to the instant FELA case was appropriate.

The trial court, upon deliberation, determined that the total offset method was appropriate for discounting an award for impairment of earning capacity to present worth and it properly instructed the jury in this regard. The court's action conforms to this Court's decisions in *Jones & Laughlin Steel Corp. v. Pfeifer* and *St. Louis Southwestern Rwy. Co. v. Dickerson*. In addition, MSW presented no evidence for the use of an alternative discounting method.

If application of the total offset method in this case was erroneous, the error was harmless, because it had only a *de minimis* effect on the jury's verdict.

If a new trial is ordered in this case because of the alleged error in present value determination, the retrial should be limited to the issue of damages.

ARGUMENT

I. Rule 238, as a rule of state procedure, may properly be applied to actions brought in state court under the FELA, without contravening federal law.

A. Rule 238 is a validly promulgated procedural rule applicable to all cases brought in Pennsylvania state courts.

The rule-making power of the Supreme Court of Pennsylvania is set forth in Pennsylvania's constitution, which provides, in pertinent part, that "[t]he Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all [Pennsylvania state] courts . . ." Pa. Const. art. V, §10(c). Pursuant to its constitutional grant of authority, the court promulgated Pennsylvania Rule of Civil Procedure 238, 42 Pa. C.S. (Rule 238) on November 20, 1978.

The purpose of Rule 238 is grounded in the court's recognition that, in Pennsylvania,

> [t]he judicial system has long been vexed by the problems of congestion and delay in the disposition of civil actions for bodily injury, death or property damages pending in the trial courts . . . in too many cases, meaningful negotiations commence only after a trial date has been fixed or on the courthouse steps or in the courtroom, thus leading to delay in the disposition of cases and congestion in the courts.

1 Goodrich-Amram 2d, Procedural Rules Service, Section 238:1. Rule 238 was designed to help alleviate that congestion and delay by creating an impetus for early, meaningful settlement negotiations.

The application of Rule 238 is made contingent upon both the actions of the parties and the amount of the verdict in determining whether and for what period pre-verdict interest is to be awarded in any particular case. Interest is added only in those cases where the defendant

fails or delays in making a written settlement offer or where, when a written offer is made, it is less than eighty percent (80%) of the jury's verdict. Interest doesn't begin to run until one year after the cause of action accrues or when suit is filed, whichever is later. If pre-verdict interest under Rule 238 was an element of damages, it would be added in all cases uniformly, rather than only in appropriate cases calculated on the basis of the behavior of the parties in each qualifying action.

In *Laudenberger v. Port Authority of Allegheny County, supra*, the court recognized that it is "limited by the language of the [Pennsylvania] Constitution to promulgating only those rules which do not interfere with the substantive rights of litigants." *Id.*, 436 A.2d at 153-154. In this context, the court noted that "the purpose and effect [of Rule 238] are procedural, yet its performance will touch upon substantive rights of both parties." *Id.*, 436 A.2d at 155. Despite what it considered to be a collateral effect on substantive rights, however, the court upheld Rule 238 as a valid exercise of its procedural rule-making function since, "when viewed from the perspective of its purpose and goal, [the rule] contributes to the orderly and efficient administration of justice in Pennsylvania . . .," *id.*, by encouraging settlement and alleviating congestion in state court dockets.

It is the policy of this Court to accord "respectful consideration and great weight to the views of the state's highest court on matters of state law." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980). Moreover, the Pennsylvania Supreme Court's determination in *Laudenberger* was

appealed to this Court which dismissed the appeal for want of a substantial federal question, *sub nom. Bucheit v. Laudenberger,* 456 U.S. 940 (1982). This is especially significant because such a dismissal by this Court is a decision on the merits of the case. *See Hicks v. Miranda,* 422 U.S. 332 (1975). Accordingly, the Pennsylvania Supreme Court's conclusion in *Laudenberger* that Rule 238 is a validly promulgated rule of state procedure which applies to all civil actions brought in Pennsylvania state courts without violating the constitutional standards of equal protection or substantive due process, is entitled to great, if not controlling, weight.

In its decision in this case, the Supreme Court of Pennsylvania relied on *Laudenberger* in concluding that Rule 238 is a procedural rule which does not conflict with any provision of the FELA and that the purpose behind Rule 238 of alleviating court congestion applies with equal force to FELA cases, since they "contribute to such congestion the same as cases instituted under state laws." (Jurisdictional Statement, Appendix A, pp. 16a-17a). Mr. Morgan submits that, under these circumstances, the courts of Pennsylvania are justified in holding that cases brought in state court under the FELA are subject to Rule 238, because federal law does not prohibit Rule 238's use and the application of the rule to FELA actions fosters settlement negotiations in those cases and furthers Rule 238's goal of reducing the case load of Pennsylvania state courts. Indeed, were the courts of Pennsylvania to hold that Rule 238 did not apply to cases brought under the FELA, railroads would be placed in a position more favorable than that of defendants in other civil actions and the difference would arguably violate the requirements of equal protection.

B. There is no conflict between Rule 238 and the FELA or general federal law that would preclude the application of the rule in FELA actions brought in state courts.

1. Neither the FELA nor the federal interest statute prohibits the addition of prejudgment interest to a jury award.

Generally, an award of prejudgment interest in a federally created cause of action is not prohibited under federal common law. Rather, federal law provides that, in the absence of a statutory directive, the decision of whether to award prejudgment interest is in the sound discretion of the federal district courts. *Blau v. Lehman,* 368 U.S. 403, 414 (1962); *Lodges 743 and 1746, etc. v. United Aircraft,* 534 F.2d 422 (2d Cir. 1975); *Payne v. Panama Canal Co.,* 607 F.2d 155 (5th Cir. 1979). Federal courts have exercised this discretion to impose prejudgment interest in personal injury and wrongful death litigation, admiralty cases, Jones Act claims, suits arising under the Death on the High Seas Act, Labor Management Relations Act disputes, Longshoremen's and Harbor Workers' Compensation Act suits, negligence claims, and claims arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, and the Federal Labor Standards Act.[3]

[3] *See, e.g., Payne v. Panama Canal Co., supra; Lodges 743 and 1746, etc. v. United Aircraft, supra; Howell v. Marmpegaso Compania Naviera, S.A.,* 578 F.2d 86 (5th Cir. 1978); *First National Bank of Chicago v. Material Services Corp.,* 597 F.2d 1110 (7th Cir. 1979); *Solomon v. Warren,* 540 F.2d 777, 794 (5th Cir. 1976), *reh. den.,* 545 F.2d 1298 (1977); *Monaghan v. Uiterwyk Lines, Ltd.,* 607 F. Supp. 1020 (E.D. Pa. 1985); *Chang v. University of Rhode Island,* 606 F. Supp. 1161 (D.C. R.I. 1985); *United States v. Rhode Island Department of Employment Security,* 619 F. Supp. 509 (D.C. R.I. 1985); *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.,* 604 F. Supp. 962 (E.D. Pa. 1985); *Feltz v. U.S. News & World Report, Inc.,* 613 F. Supp. 634 (D.C. D.C. 1985); *Kann v. Keystone Resources, Inc.,* 575 F. Supp. 1084 (W.D. Pa. 1983); *Ford v. Alfaro,* 785 F.2d 835 (9th Cir. 1986); and *E.E.O.C. v. County of Erie,* 751 F.2d 79 (2d Cir. 1984).

In *Humphries v. Pittsburgh & Lake Erie Railroad Company*, 328 Pa. Super. 119, 476 A.2d 919 (1984), *cert. denied*, 474 U.S. 863 (1985), the Superior Court of Pennsylvania specifically held that pursuant to Rule 238, prejudgment interest may be awarded in FELA cases brought in state court, without violating federal law. As was noted by the court in *Humphries*, the FELA contains no provision either allowing or prohibiting prejudgment interest. *Id.*, 476 A.2d at 922. Moreover, the court recognized that the federal interest statute, 28 U.S.C. §1961, which provides for post judgment interest at various state rates on verdicts obtained in federal courts, is silent on the question of prejudgment interest. *Id.*, 476 A.2d at 923. Relying on *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), the court accepted the view that section 1961 is permissive on the matter of prejudgment interest, since section 1961 governs all civil actions in federal district courts and prejudgment interest has frequently been awarded in nondiversity cases without express statutory authority. *See also, Bricklayers Pension Trust Fund v. Taiariol*, 671 F.2d 988 (6th Cir. 1982).

The *Humphries* court also found support for the award of prejudgment interest in two rulings of this Court, *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261 (1916), and *Massachusetts Benefit Association v. Miles*, 137 U.S. 689 (1891).

In *Stewart*, this Court upheld the application, to an FELA case, of a Kentucky statute which authorized the state court of appeals to add ten percent in damages to the amount of a judgment, in order for an unsuccessful defendant to obtain a supersedeas while the case is being appealed. *Accord, Louisville & N.R. Co. v. Holloway*, 246 U.S. 525 (1918); and *Locke v. Allstate Insurance Co.*, 696

F.2d 1340 (11th Cir. 1983). In *Miles*, this Court held that the federal interest statute in effect at the time, which provided for the calculation of interest only from the date of the judgment, was properly augmented by a Pennsylvania state statute which allowed interest to be determined from the date of the verdict.[4] In justifying its holding, this Court noted that

> Section 966 [the predecessor of 28 U.S.C. §1961], while providing only for interest upon judgments, does not exclude the idea of a power in the several states to allow interest upon verdicts, and where such allowance is expressly made by a state statute, we consider it a right given to a successful plaintiff of when (sic) he ought not to be deprived by a removal of his case to the federal court.

Miles, 137 U.S. at 691. The *Humphries* court concluded that, in light of this Court's holdings in *Stewart* and *Miles*, general principles of federal law do not prevent states from authorizing awards of prejudgment interest pursuant to express state statutes, even in cases arising under federal law, or in which federal statutes are otherwise implicated.

Moreover, as was noted by the *Humphries* court, the question of interest is generally one of local law. *See, Holden v. Freedman's Savings and Trust Co.*, 100 U.S. 72 (1879); *Ohio v. Frank*, 103 U.S. 697 (1881); and *Louisiana & Arkansas Ry. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944). In *Pratt*, which is cited by MSW and *amicus curiae*, the court stated specifically that,

> [s]tate and federal courts exercise concurrent jurisdiction over causes arising under the Federal Employers' Liability Act; interest is essentially a

[4] In Pennsylvania practice, judgment cannot be entered on a jury verdict for at least ten days, and if post-trial relief is sought, then only upon determination of the post-trial motion. Pa. R.Civ.Pro. 227.1 and 227.4.

> question of local law; and for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied wherever it is practicable to do so. . .

Pratt, 142 F.2d at 850.

MSW and *amicus curiae* create the unwarranted impression in their briefs that prejudgment interest is an anathema to federal jurisprudence and, thus, cannot be assessed in cases in state courts arising under federal law. They primarily cite cases in which federal courts have refused to apply state substantive mandatory prejudgment interest laws. Mr. Morgan submits that, as explained by the Superior Court of Pennsylvania in *Humphries*, federal law, including the decisions of this Court, does not preclude state courts from applying state rules which are procedural in nature and which regulate the imposition of interest on state court judgments. As stated in *Humphries*,

> [c]ases which declare that the acts of Congress supersede all state legislation on the subject of liability of railroad companies to their employees have nothing to do with the matter at hand. The Pennsylvania procedural rule does not meddle with that. It deals only with *interest* on the monetary loss resulting from the damage or injury "compute[d] . . . from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the . . . verdict or decision [at 10% per annum]" Pa. R.Civ.P. 238(a)(1) & (2).

476 A.2d at 926.

2. Application of Rule 238 to an FELA case brought in a Pennsylvania state court is consistent with the congressional purpose underlying the FELA.

As noted previously, the FELA is silent on the award of prejudgment interest. This Court has stated that "the failure to mention interest in statutes which create obligations has not been interpreted as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. *Rodgers v. United States*, 332 U.S. 371, 373 (1947), *citing Billings v. United States*, 232 U.S. 261 (1914). Rather,

> . . . in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. . . . As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.

Rodgers, 332 U.S. at 373 (citations omitted).

This Court has recognized that the general congressional intent behind enacting the FELA was "to provide liberal recovery for injured workers," and that "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's

duty towards its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). Accordingly, "[t]he coverage of the statute is defined in broad language, which has been construed even more broadly. [This Court has] recognized generally that the FELA is a broad remedial statute, and [has] adopted a standard of liberal construction in order to accomplish [Congress'] objects." *Atchison, T. & S.F. Ry. v. Buell*, _____ U.S. _____, 107 S. Ct. 1410, 94 L.Ed. 2d 563 (1987).

In light of the FELA's remedial purpose, "there is an excellent case that an award of prejudgment interest . . . would further the goal of recovery that underlies the FELA." *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987). This is because prejudgment interest would ensure that workers are fully compensated for their injuries.

As was stated by the district court in *Garcia v. Burlington Northern Railroad Co.*, 597 F. Supp. 1304 (D.Co. 1984); *rev'd on other grounds*, 818 F.2d 713 (10th Cir. 1987), "full compensation to an injured worker requires compensation from the date of the injury." 597 F. Supp. at 1308. Moreover, "an injured worker's damages should not depend on the mere fortuity of when the case goes to trial." *Id.* Thirdly, "[d]epriving an injured worker of the right to interest on the debt created with his injury, merely encourages defendants to put off the day of judgment as long as possible." *Id.* at 1309.

Allowing the award of prejudgment interest would serve to ameliorate these concerns as they apply to FELA cases. Such interest would compensate an injured worker for the period of time between his injury and the payment of money damages, during which he does not receive the compensation to which he was rightfully

entitled. Furthermore, in accordance with Rule 238's purpose of fostering early settlement and preventing delays in litigation, the spectre of prejudgment interest in an FELA case would encourage defendants to make early and reasonable offers of settlement to their injured employees, resulting in the employees obtaining their compensation more quickly.

Although *Poleto's* holding does not support the addition of pre-verdict interest and *Garcia* has been overruled by a later Tenth Circuit decision, each opinion contains persuasive reasons justifying such interest in FELA cases. Since this Court has never ruled on this issue, Mr. Morgan urges it to consider the rational economic and remedial bases for including pre-trial interest as an element of just compensation in all cases, even though the issue now before the Court concerns the procedural nature of such interest.

Mr. Morgan submits that the arguments of MSW and *amicus curiae* that the award of prejudgment interest in FELA cases would upset the balance of equities between employers and employees and would destroy the uniform application of the FELA are spurious.

As mentioned in *Rodgers, supra*, this Court, when determining the balance of relative equities between parties, has been guided by the long-standing principle that a party who has suffered injury because of another party's breach of duty should be fairly compensated for the losses he sustained. An award of prejudgment interest which is in keeping with this principle, serves merely to ensure that the injured party receives full compensation for his injury, while the party determined to be responsible for that injury is made to satisfy the full extent of the obligation he has incurred by reason of his fault. Without prejudgment interest, the injured

employee is essentially assisting the railroad in financing his award until it is paid, a period during which he suffers economic deprivation.

Moreover, to the extent that the compensation scheme of the FELA does embody a congressionally orchestrated balance between employer and employee rights, "[i]t is far from certain that interest was a conscious factor in the striking of that balance . . ." *Poleto*, 826 F.2d at 1279. Certainly if Congress felt that the award of prejudgment interest would destroy the equitable balance between the employee and the employer in FELA cases, the act would so provide.

Rather, as the opinions of this Court indicate, when Congress provided for concurrent jurisdiction in both federal and state courts over FELA cases, "[i]t contemplated suits in state courts and accepted state procedure in advance," even if the procedure imposed liability for an additional sum. *Dickinson v. Stiles*, 246 U.S. 631 (1918); *see also, Louisville & Nashville Railroad Company v. Stewart, supra*, 241 U.S. 261 (addition of ten percent damages in order to obtain a supersedeas, as required under state law, was held to be permissible); *Massachusetts Benefit Association v. Miles, supra*, 137 U.S. 689. This is especially true in the matter of interest, since section 1961, the federal interest statute, and Rule 37 of the Federal Rules of Appellate Procedure both make reference to state law in fixing the rate of interest on judgments. *See, Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983). Consequently, because rates of interest vary from state to state, the federal statute's reliance on state law means that there will not be uniformity on this issue. See *Robertson v. Wegmann*, 436 U.S. 584 (1978).

Finally, MSW's contention that awarding Rule 238 prejudgment interest in FELA cases will undermine the uniformity of the FELA's application is itself undermined by the fact that the rule is not automatic in its award of prejudgment interest and by the action of the Supreme Court of Pennsylvania in *Craig v. Magee Memorial Rehabilitation Center*, 512 Pa. 60, 515 A.2d 1350 (1986), suspending the mandatory provisions of the rule. Since the *Craig* decision, plaintiffs are awarded prejudgment interest only after a hearing to consider the causes of delay in determining whether an award of interest is appropriate. Accordingly, an award of prejudgment interest in Pennsylvania cannot be reasonably predicted.

3. Application of Rule 238 to FELA cases brought in state courts does not conflict with principles of federal preemption.

MSW contends that Pennsylvania's Rule 238 cannot be applied to cases brought in state court under the FELA, because the state rule is in conflict with federal legislation that has preempted the field of railroad workers' compensation. This Court, however, has stated that it "can be asked to condemn a state statute as in conflict with national legislation only if the conflict is clearly shown." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 467 (1945). Moreover,

> [i]t . . . should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or

conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'

Missouri, Kansas & Texas Railway Company v. Harris, 234 U.S. 412 (1913), *quoting Reid v. Colorado*, 187 U.S. 137 (1902).

Mr. Morgan submits that MSW has not, and cannot, show Rule 238 to be clearly inconsistent with federal law. As noted, Congress has not expressed an intent to preclude prejudgment interest in FELA claims. Moreover, as mentioned above, Rule 238's intended goals of facilitating early settlement and alleviating congestion of state court dockets clearly furthers the FELA's purpose of providing injured workers with full and speedy compensation for their injuries. Even if, as MSW contends, the state rule may infringe upon the uniformity of the FELA's application, this is not a conflict, let alone one which is so direct or positive "that the two acts could not be reconciled or consistently stand together."

Indeed, the constitutional balance between states' rights and federal power would seem to require that states be allowed to apply their procedural prejudgment interest rules to all cases in state courts, including those brought under the FELA. The 10th amendment to the U. S. Constitution reserves power to the states to provide for the determination of controversies in their courts. Only Congress can restrict that power by legislation conforming with the judiciary sections of Article III. *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969). In this regard, Justice Frankfurter noted that: ". . . [t]he power reserved to the states, under the Constitution, to provide for the

determination of controversies in their courts may be restricted only by the action of Congress, in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76-77 (1941).

Because Congress has not expressed an intention to prohibit application of state procedural prejudgment interest rules to FELA actions, the rightful ability of state courts to apply valid state procedural rules in state court cases should not be infringed upon by inferring such a narrow congressional intent from the broadly remedial FELA.

II. Application of the total offset method to reduce damages for loss of future income to present value was proper in this case and should be affirmed.

A. The trial court's application of the total offset rule as a method of reducing an award for impairment of earning capacity to present worth was in accordance with this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*.

MSW suggests that the future damage award in this case was not reduced to present value, even though the trial court applied the total offset rule, an acceptable method for reduction of future economic losses to present worth.

Both the Superior and Supreme Courts of Pennsylvania properly understand that this Court, in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983),

> . . . [held that] the total offset method adopted for use in Pennsylvania negligence cases is not a *mandatory* rule in federal trials; declined to adopt the total offset rule, or any rule, as the *mandatory* method for determining future damages in federal court cases; ruled that use of the total offset rule is not prohibited if the trial court finds it to be the appropriate method under the circumstances; and held that the trial court must make a deliberate choice, rather than assuming that it is bound by a rule of state law.

(Pennsylvania Supreme Court opinion, Jurisdictional Statement, Appendix A, p. 8a) (Citation omitted).

"In the instant case, the trial court 'spent considerable time' determining whether an instruction on present worth should be incorporated in her charge to the jury." (Superior Court opinion, Jurisdictional Statement, Appendix B, p. 34a). She noted that the traditional present worth-inflationary factor approach resulted in pure speculation and accepted the rationale set forth by the Supreme Court of Pennsylvania in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), in determining that the total offset method should be chosen as the means of reducing future damages to their present value in the case at bar.

On this matter, the trial court instructed the jury as follows:

> Now, it used to be that in these cases the Court would instruct the jury that any moneys that would be awarded to the plaintiff would be reduced to something called present worth. The law now provides that there need not be such a reduction and that the jury, however, is not to consider the inflation rate in arriving at an appropriate figure in the way of damages. By the result of a court decision, the inflation rate and present worth have been equated with each other; and you need not make any adjustment in your verdict for either of those two factors. (J.A. at 61a).

The trial court made a deliberate choice of the present value method it considered appropriate in the case at bar, based on sound policy concerns (J.A. 48a-50a, 55a-56a).

With the total offset method, actual proof of the recognized existence of inflation is eliminated, as is the requirement to discount the award for future loss of income to present worth. By applying the method to the instant case, the trial court simply accommodated the difficulties in proof with the reality of inflation and balanced the discount rate against the rate of inflation. In sum, the trial court chose a predictable, efficient, and accurate method which properly handled the measure of damages for probable loss of future income in a way that was equitable and fair to all parties.

The trial court's actions do not conflict with this Court's dictates in *Pfeifer*. In *Pfeifer*, this Court approved the use of the total offset method as a means for determining present worth of impairment of earning capacity in suits governed by federal law.

Reflecting on the inequities of discounting awards to present worth without considering inflation, this Court reviewed the methods available for reduction to present worth, declined to adopt a mandatory or exclusive method, and remanded the case to the lower court to select an appropriate method to reduce the award in that case to present worth, permitting the lower court to use the total offset method.

Justice Stevens, writing for the Court, commented on the inequity of past federal court decisions, saying that

> "[a]t one time many courts incorporated inflation into only one stage of the calculation of the award for lost earnings. . . .

> The effect of these holdings was to deny the plaintiff the benefit of the impact of inflation on his future earnings, while giving the defendant the benefit of inflation's impact on the interest rate that is used to discount those earnings to present value. . . .

462 U.S. at 539-540. MSW sought to continue the inequitable practice criticized by this Court in *Pfeifer* by requesting a jury instruction that required discounting to present worth and ignored inflation after the trial court advised the parties she intended to apply the total offset method to avoid consideration of inflation and discounting[5] (J.A. 48a-50a, 55a-56a).

This Court reviewed various approaches of reduction to present worth, including the Pennsylvania rule in *Kaczkowski*, which "deemed the market interest rate to be offset by future price inflation." 462 U.S. at 546. About the total offset method as outlined in *Kaczkowski*, Justice Stevens noted that it has the "virtue of simplicity and may even be economically precise." 462 U.S. at 546.[6] This Court declined however, to select any one rule "and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy." 462 U.S. at 546.

Accordingly, the *Pfeifer* decision makes clear that this Court permits use of the total offset method by stipulation of the parties or by choice of the trial court. 462 U.S. at 551-553.

[5] Even though the trial court denied MSW's request for instructions on discounting to present worth, counsel for MSW nonetheless argued that concept to the jury (J.A. 57a-58a).

[6] Ironically, MSW seeks a new trial on damages because of the use of the total offset theory, when a criticism by this Court of the total offset concept in *Pfeifer* is that it might actually *undercompensate* some plaintiffs. 462 U.S. at 550, n. 31.

In its argument that selection of the appropriate method of reducing future damage awards to present worth is to be made by the jury in a jury trial, MSW is proposing to this Court that it require each trial of an action under the FELA, the Jones Act, and other federally created causes of action to be expanded into lengthy hearings employing economists and other experts and extended deliberations by lay jurors to determine which of the myriad of complex methods should be used to reduce future economic loss to present worth. Such a ruling would unduly extend the duration of trials and increase congestion in the state and federal courts.

MSW cites this Court's opinion in *St. Louis Southwestern Rwy. Co. v. Dickerson*, 470 U.S. 409 (1985), for the proposition that an instruction on present worth in FELA suits is required under *Pfeifer* and that, because no such instruction was given by the trial court in this case, the case should be remanded for a new trial. This Court stated in *Dickerson* that

> . . .[a]lthough our decision in [Pfeifer] makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damage award is error. . . .

470 U.S. at 412. The circumstances of *Dickerson*, however, are clearly distinguishable from the case *sub judice*.

In *Dickerson*, the plaintiff proved what his future wage losses would be over the course of his lifetime. The trial court, however, refused to take any action that would

reduce that figure to present worth. In the case at bar, the only future wage loss evidence was the present rate of Mr. Morgan's loss of earnings. No effort was made to show the effects on that loss of inflation or productivity. The trial court acted to reduce that loss to present worth by the total offset method and instructed the jury not to incorporate any inflationary increases into the future wage losses (J.A. 61a). This instruction and the evidence in the case should satisfy the requirement in *Dickerson* to reduce future earnings loss awards to present worth.[7]

Finally, MSW has failed to establish that an alternative method for reducing future losses to present worth would have been proper in this case. At trial, MSW offered no evidence to provide the trial court with a basis on which to make a judgment about the appropriate reduction theory to be used. As was noted by the Superior Court of Pennsylvania, MSW was therefore not entitled to a jury instruction on an alternative method for reducing future damages to present worth, because it had failed to offer evidence that would justify the use of any other method. (Jurisdictional Statement, Appendix B, p. 35a).

This view is supported by *O'Roarke v. Eastern Airlines, Inc.*, 730 F.2d 842 (2d Cir. 1984) in which the United States Court of Appeals for the Second Circuit, following this Court's holding in *Pfeifer*, approved the use of the total offset method to reduce an award to present worth in a Federal Tort Claims Act case. As discussed in *O'Roarke*, it is necessary to offer supporting

[7] The jury apparently reduced the future wage loss even more than the total offset method warranted. With a wage loss of nearly $50,000 at the time of trial, and a future loss at the rate of approximately $5,000 a year at the age of 50, the verdict of $125,000 does not fully award Mr. Morgan his lost wages and future losses and compensate him for pain and suffering, as the jury was instructed to do.

evidence in order to determine a method of discounting to present worth if the total offset method is not to be used. "If [the defendant] had wanted the lower court to adopt one of the alternate discount rates . . ., it should have had its own experts testify on this matter. . . ." *O'Roarke*, 730 F.2d at 858.

B. Any alleged error regarding the use of the total offset method in the case at bar is harmless, because it had only a *de minimis* effect on the jury's verdict.

Assuming *arguendo* that the total offset method is inconsistent with the general rule of damages in FELA cases, any error in its use under the circumstances of this case is harmless. Prior to trial, Mr. Morgan had returned to work for the defendant railroad in the capacity of a foreman earning the rate of pay he would have earned had he returned to work as a trainman. At the time of trial, his earnings were greater than they had been at the time he was injured and his pension rights were unaffected. He shared in the same incentive pay and was to receive the same pay raises he would have received had he continued working as a trainman. Although Mr. Morgan's earning capacity is impaired, his probable loss of future earnings, on the basis of this record and MSW's contention at trial, was *de minimis*.

In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), this Court said that the requirement that evidence of the effect of income taxes be used to reduce damages in an FELA case can be overlooked where its effect would be *de minimis*. Justice Stevens, speaking for the Court, said:

> "This is not to say, however, that introduction of evidence [regarding income taxes] must be permitted in every case. If the impact of future income tax in

calculating the award would be *de minimis*, introduction of the evidence may cause more confusion than it is worth. . ."

444 U.S. at 494, n. 7.

Similarly, confusion as to the present value of any lost future income was properly avoided in this case, where Mr. Morgan's post-injury earnings at the time of trial were greater than his pre-injury income and his employer promised to continue the growth of his income. Any change in the method of reducing damages to present worth, therefore, would have a negligible effect on the jury's verdict.

In addition, MSW is required to demonstrate that the jury increased the recovery it awarded to the plaintiff because of the trial court's charge. *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980); *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981). No such showing has been attempted or is possible in this case where there was permanent disabling injury to a 46-year-old trainman who lost earnings as of the time of trial of nearly $50,000.00 and received a verdict of only $125,000.00 which was to compensate him for his wage loss, the impairment of his earning capacity and pain and suffering.

III. If a new trial is ordered in this case, it should be limited to the issue of damages.

The only question raised in MSW's appeal for a new trial relates to reduction of future wage losses to present worth. No complaint is made of the trial of the issues of negligence.

In federal appeals cases concerned with the propriety of damages instructions to juries, including instructions on reduction to present worth, the circuit courts remanding for new trials have limited the retrials to the issue of damages alone. *Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275 (5th Cir. 1980); *Flanigan v. Burlington Northern, Inc., supra; O'Byrne v. St. Louis Southwestern Ry. Co.*, 632 F.2d 1285 (5th Cir. 1980); *Doca v. Marina Mercante Nicarguense S.A.*, 634 F.2d 30 (2d Cir. 1980); *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394 (3d Cir. 1984). In *Lang, Flanigan*, and *DiSabatino*, the courts limited the retrial to damages notwithstanding the fact that issues of liability were also raised on appeal.

Pennsylvania courts, too, have used the expedient of limiting retrials to damages where the issue of liability has been fairly determined and the defendant makes no complaint. *Troncatti v. Smereczniak*, 428 Pa. 7, 235 A.2d 391 (1967); *Albert v. Alter*, 252 Pa. Super. 203, 381 A.2d 459, 471 (1977).

Conclusion.

For all of the foregoing reasons, appellee respectfully requests this Court to dismiss this appeal or affirm the judgment of the Supreme Court of Pennsylvania. In the event this case is remanded for a new trial, appellee requests that the retrial be limited to the issue of damages only.

Respectfully submitted,

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BRIEF

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No. 86-1743

IN THE

Supreme Court of the United States

October Term, 1986

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,

vs.

GERALD L. MORGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

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REPLY BRIEF FOR APPELLANT

In accordance with Rules 34.4 and 35.3 of the Rules of this Court, appellant, the Monessen Southwestern Railway Company (the "MSW"), submits this brief in reply to the brief for appellee Gerald L. Morgan.

ARGUMENT

I. None Of Morgan's Arguments Justify The Application Of Pennsylvania's Prejudgment Interest Rule To This FELA Case.

A. The Fact That Pa.R.Civ.P. No. 238 May Have Been Validly Promulgated Is Utterly Irrelevant To The Issues Of Federal Preemption Presented By This Appeal.

Apparently because he was successful in inducing the trial and appellate courts of Pennsylvania into believing that the principal issue in this case is whether Pa.R.Civ.P. No. 238 was validly promulgated, counsel for Morgan makes this his first argument in this Court. *See*, Brief For Appellee at 8-10. But as the MSW pointed out in its Brief In Opposition To Appellee's Motion To Dismiss Or Affirm at 4-5, this argument is utterly irrelevant to the issues of federal preemption which this case presents. For however Rule 238 was promulgated and however noble were its purposes, the core issue in this case is whether that state rule contravenes federal law by impinging on the essential federal character of the FELA. *See, e.g., Brown v. Western Ry. of Alabama*, 338 U.S. 294, 298 (1949), in which this Court held that "strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by [the FELA]."

As this Court stated in *Free v. Bland*, 369 U.S. 663, 666 (1962):

> "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that federal law must prevail. Article VI, Clause 1. This principle was made clear by Chief Justice Marshall when he stated for the Court that

> any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield. [citing cases]. Thus our inquiry is directed toward whether there is a valid law, and if so whether there is a conflict with state law."

See also, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 281, n.9 (Powell, J. dissenting) ["Federal preemption doctrine applies regardless of the importance of the issue to local authorities," citing *Fidelity Federal Savings & Loan Ass'n v. DeLa Cuistra*, 458 U.S. 141, 153 (1982)].

In short, Pa.R.Civ.P. No. 238 cannot be applied to this FELA case because, as this Court has long held, federal law provides the measure of damages in FELA cases and state rules, like Rule 238, which purport to enlarge that measure must yield to it.[1]

B. Morgan's Inability To Respond To Eighty Years Of Unanimous Judicial Precedent Disallowing Prejudgment Interest In FELA Cases Demonstrates The Lack Of Merit In His Argument.

Morgan makes no response whatsoever to the eighty years of now unanimous judicial precedent in both the state and federal courts of this country holding that there can be no award of prejudgment interest in suits

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[1] Morgan's continued reliance on this Court's dismissal of the appeal in *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 436 A.2d 147 (1981), *appeal dismissed for want of a substantial federal question, sub nom., Buchert v. Laudenberger*, 456 U.S. 940 (1982), is clearly misplaced. As the MSW pointed out in its Brief In Opposition To Appellee's Motion To Dismiss Or Affirm at 5, that case did not involve the issue of federal preemption which this case presents but only the question whether Pa.R.Civ.P. No. 238 violates the Equal Protection and Due Process clauses of the Fourteenth Amendment.

under the FELA. *See* Brief For Appellant at 5, n.11.[2] Instead, he resorts to a litany of other federal statutes and to decisions which have no bearing on the issue *sub judice*. The Death on the High Seas Act, the Longshoreman's and Harbor Worker's Compensation Act and the Jones Act constitute statutory codifications of the law of admiralty, a body of law which has long stood on a different footing from the law applicable to land-based tort claims. *See, First National Bank of Chicago v. Material Services Corp.*, 597 F.2d 1110, 1121 (7th Cir. 1979) [cited in the Brief For Appellee at 11, n.3]; *see also, Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985) [noting that prejudgment interest is not available in Jones Act cases brought at law as distinguished from Jones Act admiralty cases].

Nor are Morgan's references to the Labor Management Relations Act, Title VII of the Civil Rights Act, the Age Discrimination In Employment Act, or the Fair Labor Standards Act helpful to his cause. Those statutes all provide for the recovery of a sum certain in the form of backpay or vested pension benefits and any entitlement to prejudgment interest under them is expressly grounded on the plaintiff's recovery of a readily ascertainable and fixed amount of damages. *See, e.g., U.S. v. Rhode Island Dept. of Employment Security*, 619 F. Supp. 509, 515 (D.R.I. 1985) (cited in Brief For Appellee at 11, n.3).

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[2] Nor is the precedent—contrary to Morgan's position—"primarily" federal court cases as he suggests on page 14 of his brief. Other state courts have expressly declined to apply their own law on prejudgment interest to FELA actions adjudicated in their courts. *See, e.g., Carmouche v. Southern Pacific Transportation Co.*, 01-86-0083-CV (Tex. Ct. App. Mar. 21, 1987).

Nor do the other decisions relied upon by Morgan refute the denial of prejudgment interest under the FELA. The basic analytical errors of the Pennsylvania courts in relying upon the decision of the Fifth Circuit in *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), are catalogued in the Brief For Appellant at 26-28. Furthermore, this Court's decisions in *Massachusetts Benefit Association v. Miles*, 137 U.S. 689 (1891), and *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261 (1916), are inapposite and provide no support for Morgan's position.

In *Miles*, an action commenced in a Pennsylvania state court under state law was removed to federal court, apparently on the ground of diversity of citizenship. 137 U.S. at 689-90. A jury returned a verdict in favor of the plaintiff and, because of a delay in the entry of judgment on that verdict resulting from an anomalous Pennsylvania procedure, the issue arose whether *post-judgment* interest should be calculated from the date of the verdict or the date of the judgment. State law provided for interest "from the date of the verdict." *Id.* at 691. Federal law, Rev. Stat. Sec. 966, allowed interest at a rate provided by the state courts "from the date of the judgment." *Id.* This Court held that, *because plaintiff's action was predicated on state law*, she should not be deprived by removal of the case to federal court of "a right given to a successful plaintiff" by state law, and that interest should run from the date of the verdict.

Contrary to Morgan's contention, therefore, *Miles* does not support the application of state prejudgment interest rules to FELA actions, but in fact demonstrates the contrary. First, unlike *Miles*, the instant case arises solely under federal not state law. Indeed, this Court stated in *Miles* that, had the action rested solely on

federal law, "it is difficult to see how" state law could apply. 137 U.S. at 691. Second, *Miles* supports the MSW's argument that rules allowing prejudgment interest are substantive in character, since the Court applied state law to a state-based claim.

This Court's decision in *Stewart*, *supra*, is also of no avail to Morgan. Like *Miles*, *Stewart* does not address an issue relating to pre-judgment interest. This Court there upheld the application in an FELA case of a state law adding ten percent to a judgment if an appealing party had obtained a supersedeas and the judgment of the trial court had thereafter been affirmed on appeal. As this Court noted, there was no obligation on the part of the state to provide a supersedeas and no bar to making it more costly to the losing party when the judgment was affirmed. More importantly, the Court found the ten percent assessment acceptable because "but for such [appellate] proceedings interest would run as of course until the judgment was paid." 241 U.S. at 263. Thus, in *Stewart*, the state's imposition of these added costs was not contrary to, but was consistent with, federal law which has always allowed post-judgment interest.[5]

Morgan's reliance on the court of appeals' opinion in *Louisiana v. Arkansas Ry. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944), is similarly flawed. *Pratt* directly held that prejudgment interest is not available under the FELA, logically construing Congress' silence on the matter as indicating an intent to disallow the award. *See* Brief For Appellant at 17-18. Morgan's selective citations are lifted from the portion of the *Pratt* opinion relating to post-judgment interest which, as noted, stands on a different footing under federal law.

[5] There is also an indication in the headnotes of the reported decision in *Stewart* that the challenge to the state's post-judgment interest provisions was based on the Due Process Clause of the Fourteenth Amendment, not an assertion that an award of such interest was inconsistent with the FELA.

C. The Cases Upon Which Morgan Relies Actually Refute His Position.

Morgan's reliance on *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1279 (3d Cir. 1987), and *Garcia v. Burlington Northern R. R. Co.*, 597 F.Supp. 1304 (D.Colo. 1984), *rev'd*, 818 F.2d 713 (10th Cir. 1987), underscores the error of his ways. First, as he is forced to concede, the rulings in both cases were that prejudgment interest is not awardable in FELA cases. The reasons articulated by the court in each case are also telling. *Garcia* was reversed by the Tenth Circuit not long after that court had decided *Wilson v. Burlington Northern R. R. Co.*, 803 F.2d 563, 565 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 1604 (1987). In *Wilson*, the Tenth Circuit had held that the omission by Congress in the FELA of an express statement abrogating the common law rule against prejudgment interest manifested Congress' intent to disallow such awards, a Congressional determination which the judicial department should not thwart. Similarly, Morgan fails to acknowledge that *the* point of the Third Circuit's decision in *Poleto* is that, notwithstanding the superficial appeal of arguments that might be advanced in favor of prejudgment interest awards in FELA cases, the careful balance struck by Congress in the FELA and the unanimous authority of eighty years of judicial precedent construing that statute compel the conclusion that any enlargement of the Act to allow such awards must be left to Congress.[6]

[6] Justice Stevens, echoing remarks of the late Justice Hugo Black, expressed the same sentiments last year in *Shearson/American Express, Inc. v. McMahon*, ____ U.S. ____, 107 S.Ct. 2332, 2359 (1987) (Stevens, J. concurring in part and dissenting in part):

> "[A]fter a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the

(Footnote continued on following page.)

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Finally, Morgan ignores the fact that neither *Poleto* nor *Garcia*—nor any other authority he cites—even suggest that an award of prejudgment interest under the FELA may be predicated upon *state* law. *Poleto*, in fact, expressly refutes such an argument—it holds that, because an FELA claim "is predicated upon a violation of a federal statute, state substantive law, particularly Pennsylvania Rule of Civil Procedure 238, is not implicated." *Poleto*, 826 F.2d at 12.

Morgan also relies upon the reference in the pre-1982 version of the federal post-judgment interest statute, 28 U.S.C. §1961, to the interest rates "allowed by state law" to support his position. Similarly, he asserts that Fed.R.App.P. 37 refers to state law in fixing the rate of interest on judgments which have been affirmed on appeal. Brief For Appellee at 18.

The first point to be noted is that 28 U.S.C. §1961 was amended in 1982 to provide that interest on a money judgment in the federal courts shall not be at the rate established by state law but at a rate which is based upon the most recent average auction price of fifty-two week United States Treasury bills prior to the entry of the judgment. And Fed.R.App.P. 37 merely provides for interest on a judgment which has been affirmed on appeal as "allowed by law."

(Footnote continued from preceding page.)

> judicial gloss had been drafted by the Congress itself. . . . This longstanding interpretation creates a strong presumption, in my view, that any mistake the courts may have made in interpreting the statute is best remedied by the legislative, not the judicial branch." (Citations and footnotes omitted).

See also, Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200-01 (1974); *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972). These universally accepted principles have their roots in B. Cardozo, The Nature of the Judicial Process, 112-15 (1921).

More importantly, neither the pre- nor post-1982 versions of 28 U.S.C. §1961 authorized awards of prejudgment interest but provided only for interest "on any money judgment," *i.e.*, for post-judgment interest. Hence, neither the general, federal post-judgment interest statute nor Fed.R.App.P. 37 support Morgan's argument for an award of prejudgment interest.[5]

---

[5] The weakness of Morgan's position is further revealed by his desperate and unsupported suggestion that a failure of the Pennsylvania courts to apply Rule 238 to FELA cases would extend a benefit to railroads that "would arguably violate the requirements of equal protection". The Equal Protection Clause does not prohibit congressional adjustment of economic burdens and benefits unless the classifications made are irrational and arbitrary. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *Williamson v. Lee Optical Co.*, 348 U. S. 483, 491 (1955). In the FELA, Congress sought to adjust the "inescapable expense" of railroading equitably between the railroads and their employees by creating a federal tort remedy that eliminated certain defenses and provided a damage remedy that did not include the recovery of prejudgment interest. Just as Congress could single out the railroad industry for particular statutory treatment in the FELA, it could logically conclude that the carriers should not be further burdened with assessments of prejudgment interest. The choices Congress made were neither irrational nor arbitrary. That Pennsylvania decided more than a half-century later to allow prejudgment interest on certain classes of state law claims does not convert the FELA into constitutionally infirm legislation nor render the state courts' compliance with that federal law a violation of equal protection.

II. Morgan's Own Argument Concerning The Trial Court's Blind Adherence To State Law On The Reduction To Present Value Issue Accentuates The Error Of The Trial Court.

With respect to the trial court's failure to instruct the jury that any award for impairment of future earning power must be reduced to its present value, Morgan continues to advance the patently false argument that the trial court made a deliberate choice of the total offset method as a matter of federal law, as this Court later required in *Jones & Laughlin Steel Corp. v. Pfeifer*, 420 U.S. 469 (1983). The record completely belies that argument. Indeed, the record, as quoted by Morgan himself, unequivocally shows that the trial court looked solely to state decisional law to instruct the jury "that there need not be such a reduction [to present worth]." Brief For Appellee at 22. Furthermore, in denying the MSW's requests for charge on reduction to present value, Judge Finkelhor stated specifically that her decision was based solely on state law:

> "We have reached the decision not to give the present-worth charge; and the basis for the Court's decision is the Bulubasz [sic] Decision and the opinion of Justice Nix." (Tr. at 577).

As Justice Hutchinson stated in his dissent in the Supreme Court of Pennsylvania:

> "Judge Finkelhor's comments reveal that she did not consider other methods, but blindly followed our teaching in *Bolubasz*, and that she disagrees with the concept of discounting to present value required by federal law. In addition, her reliance on *Liepelt* seems misplaced in light of the subsequent decisions in *Dickerson* and *Pfeifer*. A state judge is not free to consider the discounting question procedural in FELA cases because the United States Supreme Court has held it is substantive. *Liepelt, supra; Kelly, supra.* The damages found by the jury were not reduced to present value as required by federal law." (Footnote omitted). Jur. Stat. at 20a-21a.

Judge Finkelhor's refusal to give a present value instruction based upon her blind adherence to state law is, thus, directly at odds with this Court's ruling in *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985), that such an instruction must be given and cannot be dispensed with on the basis of state law.

Nor has Morgan persuasively distinguished *Dickerson*. Morgan contends, incorrectly, that "the only future wage loss evidence was the present rate of [his] loss of earnings" without regard to future inflation or productivity. Morgan, however, was working at the time of trial and calculated his alleged future losses on a theory that wages he actually earned in the future would be $5,000 a year less than what he would have earned if he had not been injured. Morgan's actual future earnings, however, would necessarily include the effects of inflation and productivity, and Morgan, therefore, cannot excuse the trial court's failure to comply with *Dickerson* on this basis.

Equally unpersuasive are the efforts of the Pennsylvania appellate courts in their opinions, *see* Jur. Stat. at 8a-10a, and 33a-35a, and of Morgan in this Court, to transform the trial court's blind adherence to state law into the "deliberate choice" that *Pfeifer* requires "the trier of fact" to make. Here, the trial court's choice clearly was not deliberate and it resulted in the matter being wholly removed from the consideration of the trier of fact, *i.e.*, the jury.[8]

[8] The MSW has answered Morgan's argument that it was required to offer evidence on an appropriate present value method in the Brief For Appellant at 34.

The record is likewise wholly unsupportive of Morgan's argument that any award for impairment of future earning power by the jury in this case was *de minimis*. As Morgan himself acknowledges, his lost wages to the date of trial were approximately $50,000. Brief For Appellee at 28. And his counsel argued to the jury that his lost future earnings would be $5,000 per year for an estimated 15 years ($75,000). (Tr. 655-57, 659-62). The jury awarded him the total of these two sums ($125,000). In light of Morgan's own contentions, therefore, it is obvious that 40% of the jury's award of $125,000 was for wages lost to the date of trial, whereas 60% of it was for impairment of his future earning power.[7] Surely an award of $75,000 can hardly be characterized as a *de minimis* element of a verdict of $125,000.

III. Whether The New Trial Should Include The Issue Of Liability Or Should Be Limited To The Issue Of Damages Should Be Left To The Determination Of The Trial Court On Remand.

At trial, the issue of liability was vigorously contested by the MSW on the ground that it was not negligent and that the accident was the result of the plaintiff's own negligence. Following the jury's verdict, both parties moved for a new trial. The first ground of the plaintiff's motion was that the verdict was inadequate. (Plaintiff's Motion For New Trial, ¶1). Because there was a substantial possibility that the jury had compromised

[7] Since the jury verdict of $125,000 was equal to the total of plaintiff's claim for lost wages to the date of trial ($50,000) and the amount his counsel argued would be an appropriate award for impairment of his future earning power ($75,000), it is equally obvious that the jury made no award to plaintiff for "pain and suffering"—a not unusual result from a Pittsburgh jury of working men and women and a plaintiff who had returned to work almost three years prior to trial.

the liability issue by the amount of damages it awarded, the MSW requested a new trial on both issues and it maintained that position on appeal to the state appellate courts.

Both the state and federal courts have ruled that whether a new trial should be limited to the particular issue or issues which constitute the grounds for reversal of a judgment, or should include a new trial on all issues will depend on the particular facts of each case. *Gasoline Products Co. v. Champion Refining Co.*, 283 U.S. 494 (1931); *Gagliano v. Ditzer*, 437 Pa. 230, 263 A.2d 319 (1970).

Where, as here, the defendant contends that the jury may have compromised its verdict on liability by its award of damages, the trial court which heard the evidence and instructed the jury is in the best position to determine this issue. Indeed, not having had an opportunity to review the record on the liability issue, this Court is not in a position to make this determination in the first instance. For these reasons, in reversing the judgment in this case, the MSW submits that this Court should remand the case to the Pennsylvania courts for further proceedings consistent with its ruling and should leave to the determination of those courts the precise scope of the new trial.

Conclusion

For the reasons stated in this brief and in the Principal Brief For Appellant, the MSW respectfully submits that the judgment of the Supreme Court of Pennsylvania should be reversed and the cause remanded for further proceedings consistent with the judgment of this court.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

MOTION FILED
NOV 19 1987

No. 86-1743

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MONESSEN SOUTHWESTERN RAILWAY CO.,
Appellant,

v.

GERALD L. MORGAN,
Appellee.

On Appeal from the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads ("AAR") respectfully moves for permission to file the attached brief *amicus curiae*. This motion is being filed under Rule 36.3.[1] Counsel for appellant has consented to the filing of the brief;[2] counsel for appellee has refused to consent.

The AAR is an unincorporated, nonprofit trade organization whose members include almost all of the Class I railroads in the United States.[3] It seeks to file a brief

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[1] The brief is timely filed under Rule 36.2 since it has been submitted within the time allowed for filing the brief of the party supported, the appellant.

[2] The letter expressing consent has been filed with the Clerk of the Court.

[3] A listing of the membership of the organization appears at the Appendix to the attached brief.

amicus curiae only when a case poses an issue of great significance to the railroad industry nationwide—and in those instances such requests have been granted.[4] In recognition of the importance of this case, the AAR filed a brief *amicus curiae* in the Pennsylvania Supreme Court. After the decision by that court, the AAR moved for leave to file an *amicus* brief in support of the Jurisdictional Statement, and this Court granted the motion.[5]

The first issue posed in this appeal is whether a state court may apply a state rule which provides for prejudgment interest in a case brought under a federal statute which does not. Pennsylvania's prejudgment interest rule conflicts directly with the rule under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) ("FELA"), denying an award of prejudgment interest. It is contrary to the rule followed in other state and federal courts in FELA actions, and threatens to disrupt the uniform nationwide application of the FELA.

A second issue presented in this appeal is whether a state court may follow state law concerning discounting of future losses, and thereby deny defendant in an FELA action an instruction on present value. The lower court's ruling on this issue collides directly with this Court's ruling that a defendant in an FELA action is entitled to have the jury instructed that damages based on future losses must be adjusted to present value. *See St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985). The resolution of both of these issues will affect significantly the entire railroad industry, and not just the individual railroad involved in the litigation below.

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[4] *See Burlington Northern R.R. v. Oklahoma Tax Commission*, No. 86-337 (U.S. filed Dec. 12, 1986); *Burlington Northern R.R. v. Anderson*, No. 85-1544 (U.S. filed May 16, 1986); *Burlington Northern R.R. v. Cosby*, No. 84-1313 (U.S. filed Mar. 18, 1985); *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 450 U.S. 336 (1982); *Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980).

[5] 56 U.S.L.W. 3242 (Oct. 5, 1987).

The AAR represents the vast majority of the nation's railroads, and acts in this case, as in others, with the assistance of counsel for several railroads. The AAR is thus able to present factual information and legal analysis that will illuminate the larger importance and the industry-wide consequences of the decision rendered in the present case.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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Urie v. Thompson, 337 U.S. 163 (1949)	14, 15
Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545 (1886)	26

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OTHER AUTHORITIES:	Page
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Economic Report of the President (Feb. 1975)	29
Economic Report of the President (Jan. 1987)	29
Federal Reserve Bulletin (May 1986)	29
Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 Ohio St. L.J. 384 (1956)	19, 20
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Note, *Prejudgment Interest: An Element of Full Compensation in Wrongful Death Cases*, 1981 U. Ill. L. Rev. 453	11
Rand McNally, Railroad Atlas (1985)	2
Schwartz & Mashigian, *The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers*, 23 San Diego L. Rev. 1 (1986)	5
1 T. Sedgwick, *A Treatise on the Measure of Damages* (9th ed. 1912)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1743

MONESSEN SOUTHWESTERN RAILWAY CO.,
Appellant,

v.

GERALD L. MORGAN,
Appellee.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT

INTERESTS OF THE *AMICUS CURIAE*

The Association of American Railroads ("AAR") is a voluntary, nonprofit trade association, headquartered in Washington, D.C. Its members account for approximately ninety-three percent of the freight revenues of all railroads in the United States.

The nation's railroads have a compelling interest in the administration of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1982). More than 4,000 FELA lawsuits were filed in 1986 by railroad employees. In that year alone, the railroads paid more than one half billion dollars in FELA death and personal injury claims.

The first issue posed in this appeal arose when the Court of Common Pleas of Allegheny County, Pennsylvania, applying that State's Rule 238, added a charge denominated "delay damages" of ten percent per annum

to the amount awarded appellee Morgan in his FELA claim. Monessen Southwestern Railway challenged this prejudgment interest award on the ground that Rule 238 is preempted by the FELA. Nevertheless, the Pennsylvania Supreme Court upheld the award of prejudgment interest, reasoning that "the prejudgment interest provisions of Rule 238 [do not] contravene any provisions of the federal act" because "[t]his Court has the right to institute procedural rules designed to alleviate congestion in the trial courts." *Morgan v. Monessen Southwestern Ry.*, 518 A.2d 1171, 1177 (Pa. 1986).

The ruling of the Pennsylvania Supreme Court is inconsistent with eighty years of federal and state precedents rejecting awards of prejudgment interest in FELA actions. *See* cases cited at note 11, *infra*. Moreover, it undermines the uniform application of the FELA and creates interstate[1] and intrastate[2] conflicts with a serious potential for forum shopping.[3]

The second issue presented in this case arose when the court below, applying state law, failed to follow this Court's holding in *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985), which entitles a defendant in an FELA action to a present value instruction. The ruling below deprives the jury of an opportunity to make

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[1] *Compare Morgan*, 518 A.2d 1171, *with Wicks v. Central R.R.*, 129 N.J. Super. 145, 322 A.2d 488, 489, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974); *Hanley v. Erie R.R.*, 81 N.Y.S.2d 100, 101 (1948).

[2] *Compare Morgan*, 518 A.2d 1171, *with Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987).

[3] The FELA enables each plaintiff to file suit in any state where the defendant railroad does business, 45 U.S.C. § 56 (1982), and most railroads "do business" in a wide number of states. The forty-five railroads that "do business" in Pennsylvania collectively operate in nineteen states spread across the eastern half of the United States. *See* Rand McNally, Railroad Atlas 61 (1985). Thus, an employee of any of the railroads serving the Northeast corridor has the option of suing in state court in Pennsylvania.

an accurate estimate of the current value of the plaintiff's future losses and thus distorts damage awards under the FELA. Furthermore, insofar as this ruling makes the financial outcome of the FELA action dependent on local rules, it also will undermine the statutory goal of uniformity.

Because the court below espoused unwarranted interpretations of the FELA with potentially serious effects, the AAR filed an *amicus* brief in support of the Jurisdictional Statement. This Court noted probable jurisdiction on October 5, 1987.

SUMMARY OF ARGUMENT

At stake in this controversy is the continued preemptive effect of the FELA in the important area of damages. The FELA provides a comprehensive and exclusive remedy for injured railroad workers. The rights it creates are federal rights, which cannot be extended or abridged by local rules of law. *See New York Central R.R. v. Winfield*, 244 U.S. 147, 153 (1917).

When Congress passed the FELA, the common law uniformly rejected prejudgment interest in personal injury suits. *See* cases cited at note 13, *infra*. In enacting this federal statute, Congress directed numerous departures from restrictive common law doctrines of liability in personal injury actions, and replaced conflicting state rules with nationwide standards of liability and rules prescribing damages. These rules and standards carefully and equitably balanced the rights of railroad employees and carriers. *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326, 329 (1958). Congress did not, however, as part of this balance, abrogate the well established rule denying prejudgment interest.

The lower court ruling now threatens to upset the balance Congress struck in the FELA by allowing plaintiffs to recover an additional award of prejudgment interest based on a state prejudgment interest rule. *See* cases

cited at note 11, *infra*. Eighty years of consistent case law, however, confirms the intention of Congress that prejudgment interest not be awarded in FELA actions. In the face of this unwavering line of precedent, Congress has never seen fit to modify the balance struck in the FELA by providing for an award of prejudgment interest.

Because the denial of prejudgment interest is an integral part of the federal statutory scheme under the FELA, it preempts contrary state rules, regardless of whether the state courts characterize such rules as "procedural." *See Brown v. Western Ry. of Ala.*, 318 U.S. 294, 296 (1949). The Court in FELA actions has from the outset rejected the traditional substance-procedure dichotomy of conflict of law cases, and instead looks to the impact of a particular state rule on the federal FELA claim. Under this test, a state prejudgment interest rule which has a clear and undeniable effect on the recovery in an FELA action cannot be followed in state court in the face of federal law to the contrary. Pennsylvania's rule has already been held to have such an effect in the diversity setting, *see Jarvis v. Johnson*, 668 F.2d 740 (3d Cir. 1982), and similarly cannot be invoked to affect the amount of damages available in a federal FELA claim.

The court below also improperly followed state law when it instructed the jury not to adjust to present value its award for future losses. It has long been the rule that a verdict based upon future benefits "should be made up on the basis of their present value only." *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 490 (1916). In *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985), this Court summarily reversed a state court judgment in which a present value instruction had been refused because of a contrary state practice. The Court held that the question of a present value instruction is controlled by federal law, and under the FELA "an utter failure to instruct the jury that present value is the proper measure of damage" is error. 470 U.S. at 411. The action of the state court is not the kind of deliberate choice approved in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), because the trial court here plainly believed itself to be bound by state law. Moreover, *Pfeifer*, which involved a bench trial under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1982), is not directly applicable to the FELA jury trial at issue here because a judge that gives an offset instruction deprives the jury of its prerogative as trier of fact to determine the current value of plaintiff's future losses.

ARGUMENT

I. THE FELA DOES NOT PERMIT AN AWARD OF PREJUDGMENT INTEREST BASED ON A STATE RULE

A. The Rights and Duties Created by the FELA Are Governed Solely by Federal Law

The FELA is a comprehensive federal scheme for determining personal injury awards to railroad workers. At the time of its enactment in 1908,[4] railroad work was extremely dangerous,[5] and prevailing common law doctrines made the prospect of recovery for on-the-job railroad injuries uncertain.[6] In enacting the FELA, Congress directed a number of departures from these common law principles. The changes intended were described during debate on passage of the Act in the House of Representatives:

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[4] *See* Pub. L. No. 60-100, 35 Stat. 65 (1908).

[5] *See Johnson v. Southern Pacific Co.*, 196 U.S. 1, 19 (1904); The Report of the Employers' Liability and Workman's Compensation Commission, S. Rep. No. 338, 62d Cong., 2d Sess. 127-211 (1912); *see also* Schwartz & Mashigian, *The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers*, 23 San Diego L. Rev. 1 (1986).

[6] *See* S. Rep. No. 460, 60th Cong., 1st Sess. 2 (1908).

> At common law there was no right of recovery for damages for death resulting from negligence; by this act we authorize recovery for injury or death. At common law there could be no recovery against the employer for the neglect of fellow-servants engaged in common employment; by this act we abrogate that ancient doctrine and permit recovery for the negligence of the officers, agents, or employees, although the one guilty of negligence is a fellow-servant of the one injured or killed. At common law the one who had contributed by his own negligence to his injury could not recover, and also for the negligence of another which had been the concurring cause; by this law we authorize a recovery in such cases and only demand that the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . . At common law the employer could bind the employee by contract to renounce his right to damage in cases of injury in the course of employment; we here abrogate that rule of the common law. This statute forbids such contract. We abolish the common-law doctrine of fellow-servant . . . .

42 Cong. Rec. 4427 (1908).

Having provided a new federal remedy, Congress also left no doubt that this law, and not the laws of the states, would henceforth determine the relationship between employees and carriers with respect to railroading injuries.

> A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States.

H R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908). Thus, Congress gave state courts concurrent jurisdiction over FELA claims, 45 U.S.C. § 56 (1982), but insisted that federal law would control. "The act is comprehen-

> sive and also exclusive" and states "have no right to interfere . . . by way of complement to the legislation of Congress, to prescribe additional regulations." *New York Central R.R. v. Winfield*, 244 U.S. 147, 151, 153 (1917).

Since the enactment of the FELA, the Supreme Court has taken every opportunity to affirm that "[t]he rights which the [FELA] creates are federal rights protected by federal rather than local rules of law." *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352 (1943). The importance of nationwide uniformity in the interpretation of the statute is, moreover, a guiding principle:

> [T]he Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act. State legislatures, for example, may not intrude into the federal Act's interstate commerce perimeter to destroy uniformity.

South Buffalo Ry. v. Ahern, 344 U.S. 367, 371-72 (1953).[7] As the Court explained in *Winfield*, "[w]hether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested . . . . [T]here are weighty considerations why

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[7] *Accord Burnett v. New York Central R.R.*, 380 U.S. 424, 433 (1965) ("[t]his Court has long recognized that the FELA 'has a uniform operation and neither is nor can be deflected therefrom by local statutes'") (quoting *Panama R.R. v. Johnson*, 264 U.S. 375, 392 (1924)); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952) ("only if federal law controls can the Federal Act be given that uniform application throughout the country essential to effectuate its purposes"); *Brown*, 338 U.S. at 299 ("desirable uniformity in adjudication of federally created rights" can be achieved only absent "over-exacting local requirements for meticulous pleading"); *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943) ("[o]nly by uniform federal rules as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states").

the controlling law should be uniform and not change at every state line." 244 U.S. at 149. The relevant legislative history, the Court said, demonstrates Congress' intent that the FELA "withdraw all injuries to railroad employees in interstate commerce from . . . varying state laws, and apply to them a national law having a uniform operation throughout all the States." *Id.* at 150.

Nowhere is the controlling effect of federal law under the FELA clearer than on questions relating to damages. In repeated decisions, this Court has set forth principles that govern what damages are available under the FELA and to whom, carefully limiting the measure and types of damages available.[8] Thus, a survivor may not recover damages for "pain and suffering substantially contemporaneous" with death,[9] nor may a railroad employee recover punitive damages from his employer.[10] Moreover, FELA damage awards based on future payments must be reduced to present value. *See, e.g., Kelly*, 241 U.S. 485.

Federal law is also controlling when a question relating to damages under the FELA arises in a state court. Thus, as early as 1916, the Court refused to apply a state common law rule allowing recovery for a son's expenses and loss of services, reasoning that the FELA "can neither be extended nor abridged by common or statutory laws of the State." *New York Central & Hudson River*

[8] *See Poff v. Pennsylvania R.R.*, 327 U.S. 399 (1946) (surviving non-dependent next of kin do not exclude more distant dependent kin from recovery); *Chicago Burlington & Quincy R.R. v. Wells-Dickey Trust Co.*, 275 U.S. 161 (1927) (action may be brought on behalf of the class next in line only if there are no survivors from the prior class); *St. Louis, Iron Mountain & Southern Ry. v. Craft*, 237 U.S. 648, 658 (1915) (damages may include both pecuniary loss to designated beneficiaries and compensation for the loss and suffering of the deceased employee).

[9] *Great Northern Ry. v. Capital Trust Co.*, 242 U.S. 144, 147 (1916).

[10] *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971); *State ex rel. Burlington Northern, Inc. v. District Court of Eighth Judicial Dist.*, 169 Mont. 480, 548 P.2d 1390 (1976).

R.R. v. Tonsellito, 244 U.S. 360, 362 (1917). More recently, the Court decided that whether the jury should be instructed concerning the impact of taxes on an FELA award was a federal question: "It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. . . . This is true even if the action is brought in state court." *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 (1980). As the *Liepelt* Court emphasized, "[o]ne of the purposes of the Federal Employers' Liability Act was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." 444 U.S. at 493 n.5. Finally, in 1985, the Court left no doubt that federal law, and not state law, must govern issues pertaining to the measure of damages under the FELA.

> [Petitioner's] contention that it was entitled to a jury instruction on present value cannot be dismissed on the ground that such an instruction is not to be found in the Missouri Approved Instructions. Whether such an instruction should have been given is a federal question.

Dickerson, 470 U.S. at 411.

Thus, even though state courts have concurrent jurisdiction, these courts must apply federal law, and not state law, in matters that affect damages under the FELA. Furthermore, federal law controls prejudgment interest under the FELA not only because this charge is an additional element of damages, but because the rule denying prejudgment interest is rooted directly in the interpretation of the FELA.

B. The FELA Precludes an Award of Prejudgment Interest

The rule under the FELA with respect to prejudgment interest in clear: prejudgment interest is unavailable. The statute does not by its terms provide for an award

of prejudgment interest—and eighty years of consistent case law holds that Congress did not intend to make prejudgment interest available to FELA litigants.[11] In a leading case on the availability of prejudgment interest in an FELA action, the Fifth Circuit observed:

> The item of accrued interest presents a question of substantive law. We think, therefore, that the silence of the federal statute upon the subject of interest may not be construed as leaving the subject unlegislated upon in the Act, but is indicative of the consid-

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[11] Federal Decisions: *Wildman v. Burlington Northern R.R.*, 825 F.2d 1392, 1396 (9th Cir. 1987); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1279 (3d Cir. 1987); *Wilson v. Burlington Northern R.R.*, 803 F.2d 563, 566 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1604 (1987); *Newman v. Grand Truck Western R.R.*, 781 F.2d 55, 56 (6th Cir. 1985); *Lindsey v. Louisville & Nashville R.R.*, 775 F.2d 1322, 1325 (5th Cir. 1985); *Faulkenberry v. Louisville & Arkansas Ry.*, 551 F.2d 650, 651 (5th Cir. 1977); *Kozar*, 449 F.2d at 1244; *Powers v. New York Central R.R.*, 251 F.2d 813, 818 (2d Cir. 1958); *Briggs v. Pennsylvania R.R.*, 164 F.2d 21, 22 (2d Cir. 1947), *aff'd*, 334 U.S. 304 (1948); *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847, 848-49 (5th Cir. 1944); *Chicago, M., St. P. & P. R.R. v. Busby*, 41 F.2d 617, 619 (9th Cir. 1930); *Mahan v. Metro-North Commuter R.R.*, No. 86 (Civ. 0922 (JFK), slip op. at 4 (S.D.N.Y. Mar. 9, 1987); *Earl v. Chesapeake & Ohio Ry.*, No. 83-3040, slip op. at 4 (S.D. W.Va. June 26, 1985); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125, 127 (E.D. Pa. 1984); *Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44, 48 (M.D. Pa. 1984); *Murphy v. Lehigh Valley R.R.*, 63 F. Supp. 928, 930 (E.D.N.Y. 1945), *modified*, 158 F.2d 481 (2d Cir. 1946).

State Decisions: *Carmouche v. Southern Pacific Transp.*, No. 07-86-0083-CV (Tex. Ct. App. May 21, 1987); *Melin v. Burlington-Northern R.R.*, 401 N.W.2d 418, 420 (Minn. Ct. App. 1987); *Felder v. Union Pacific R.R.*, 660 P.2d 911, 914-15 (Colo. Ct. App. 1982); *Wicks*, 322 A.2d at 489; *Hanley*, 81 N.Y.S.2d at 101; *Ketchum v. Boston & M. R.R.*, 249 A.D. 901, 292 N.Y.S. 567, 568 (1937); *Murmann v. New York, N.H. & H. R.R. Co.*, 258 N.Y. 447, 180 N.E. 114, 115 (1932); *Mobile & O. R.R. v. Williams*, 219 Ala. 238, 121 So. 722, 731 (1929); *Bennett v. Atchison, Topeka & Santa Fe Ry.*, 187 Iowa 897, 174 N.W. 805, 807 (1919); *Grow v. Oregon Short Line R.R.*, 47 Utah 26, 150 P. 970, 971 (1915); *Norton v. Erie R.R.*, 163 A.D. 468, 148 N.Y.S. 771, 772 (1914).

> ered purpose that no interest should be allowed in [FELA] actions prior to verdict.

Louisiana & Arkansas Ry. v. Pratt, 142 F.2d 847, 848-49 (5th Cir. 1944). Every federal circuit court that has considered the question has reached the same conclusion, as have a host of district courts and state courts. *See* cases collected at note 11, *supra*. Indeed, only one federal court has ever authorized such an award, and that lone case was overruled recently by the Court of Appeals for the Tenth Circuit.[12]

The pre-enactment and post-enactment history of the FELA confirms the view that prejudgment interest is not available under the FELA. In 1908, when Congress enacted the FELA, the common law uniformly rejected prejudgment interest in suits for personal injuries or wrongful death: interest could accrue only on damages which were liquidated or set forth in a contract.[13] Thus, interest on personal injury claims accrued only *after* judgment.[14] The FELA provided a federal cause of action for precisely this type of claim. As previously noted, Congress consciously focused on the manner in which the recovery under the FELA should differ from the common law. *See* 42 Cong. Rec. 4427 (1908), quoted *supra* p. 6. It is, therefore, significant that the legislature failed to

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[12] *See Garcia v. Burlington Northern R.R.*, 597 F. Supp. 1304 (D. Colo. 1984), *rev'd*, 818 F.2d 713 (10th Cir. 1987). The Tenth Circuit reversed *Garcia* on procedural grounds, but in *Wilson*, 803 F.2d at 566, had previously noted its substantive disagreement with the *Garcia* result.

[13] *See, e.g., Washington & Georgetown R.R. v. Tobriner*, 147 U.S. 571, 585 (1893); *Lincoln v. Claflin*, 74 U.S. (7 Wall.) 132, 139 (1868); *Staley v. Forrest*, 157 Iowa 188, 138 N.W. 441 (1912); *Western & A. Ry. v. Young*, 81 Ga. 397, 7 S.E. 912 (1888); *see generally* 1 T. Sedgwick, *A Treatise on the Measure of Damages* § 316 (9th ed. 1912); C. McCormick, *Damages* § 56 (1935); Note, *Prejudgment Interest: An Element of Full Compensation in Wrongful Death Cases*, 1981 U. Ill. L. Rev. 453, 458-59.

[14] Sedgwick, *supra* note 13; McCormick, *supra* note 13, at § 58 (1913).

abrogate in the FELA the well established principle denying prejudgment interest.[16]

Furthermore, as numerous courts have recognized, the absence of prejudgment interest in the FELA formed part of the balance Congress struck in crafting this federal statute.[16] This Court has stated explicitly that "[t]he cost of human injury, an inescapable expense of railroading, must be borne by someone, *and the FELA seeks to adjust that expense equitably between the worker and carrier.*" *Sinkler v. Missouri Pacific RR.*, 356 U.S. 326, 329 (1958) (emphasis added); *see also* S. Rep. No. 460, 60th Cong., 1st Sess. 3 (1908). As part of that adjustment, Congress enlarged substantially the rights of employees by stripping the railroads of numerous common law defenses and allowing an employee to recover damages if the railroad's negligence played any part—"even the slightest"—in the employee's injury. *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 506-08 (1957).[17] Congress did not, however, take the additional, "radical" step of providing for an award of prejudgment interest. *Wilson*, 803 F.2d at 564-65.

As this Court has acknowledged, when Congress has fashioned a careful statutory balance between the interests of employers and employees, courts should refrain from upsetting such balance.[18] Thus, under the FELA,

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[15] *Cf. Michigan Central R.R. v. Vreeland*, 227 U.S. 59, 67-68 (1913) (following common law rule that right of action for an injury to the person is extinguished by the death of the party injured because the FELA as enacted in 1908 did not provide for any survival of the right of action).

[16] *Poleto*, 826 F.2d at 1279; *Wilson*, 803 F.2d at 565; *Earl*, slip op. at 4-5; *Carver*, 600 F. Supp. at 127; *Camplese*, 594 F. Supp. at 47.

[17] *Accord Sinkler*, 356 U.S. at 330; *Poleto*, 826 F.2d at 1279; *Wilson*, 803 F.2d at 565; *Earl*, slip op. at 4; *Carver*, 600 F. Supp. at 126-27; *Camplese*, 594 F. Supp. at 47; *see also* H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908); S. Rep. No. 460, 60th Cong., 1st Sess. 3 (1908).

[18] *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 112 (1974) (contribution rule under the Harbor Workers' Act was

numerous courts have refused to grant awards of prejudgment interest, emphasizing that the additional interest charge would be contrary to the congressional purpose and would "undermine the equities that have been balanced in the Act itself." *Camplese*, 594 F. Supp. at 47-48; *accord Poleto*, 826 F.2d at 1279; *Wilson*, 803 F.2d at 565; *Carver*, 600 F. Supp. at 127; *Earl*, slip op. at 4.[19]

Congress, moreover, has never seen fit to upset this careful balance of employer and employee rights under the FELA—even though the judicial view rejecting prejudgment interest has prevailed with almost perfect consistency for eighty years. *See* cases cited at note 11, *supra*. Congressional silence in the face of such a long-standing judicial interpretation is generally sufficient to signify approval.[20] Furthermore, as this Court has observed, the probative value of congressional inaction is particularly significant where Congress has previously amended the statute at issue when it is displeased with a particular judicial interpretation.[21] The FELA is

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rejected because of "the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers").

[19] *Compare Rodgers v. United States*, 332 U.S. 371, 373 (1947), where this Court held, in a non-FELA case, that if a federal statute is silent with respect to prejudgment interest, the court must examine the "congressional purpose" of the statute. The *Rodgers* Court considered specifically the "relative equities between the beneficiaries of the obligation and those upon whom it has been imposed" and declined "to add interest to those very substantial penalties already imposed." 332 U.S. at 373, 376.

[20] *See, e.g., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200-01 (1974) ("[i]n the face of this long-standing [forty years] interpretation and . . . congressional silence," the Court refused to extend the accepted interpretation of a statutory provision); *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) ("Congress, by its positive inaction has allowed those decisions to stand for so long [fifty years] and . . . has clearly evinced a desire not to disapprove them legislatively").

[21] *See Johnson v. Transportation Agency, Santa Clara County, Cal.*, 107 S. Ct. 1442, 1450 n.7 (1987).

clearly a statute that has not wanted for congressional attention and correction when the judiciary has set a course of which Congress disapproves.[22] Its failure to amend the statute to overturn the court decisions rejecting prejudgment interest is particularly significant since, in other instances where Congress has intended to provide for prejudgment interest, it has put specific provision for an interest charge into the statute at issue.[23]

The body of precedent rejecting prejudgment interest has grown up in harmony with the practice of liberally construing certain other facets of the FELA. In a number of cases, this Court has utilized a "standard of liberal construction" in order to decide questions of liability under the Act. *Atchison, Topeka & Santa Fe Ry. v. Buell*, 107 S. Ct. 1410, 1414 (1987); *accord Kernan v. American Dredging Co.*, 355 U.S. 426, 432 n.7 (1958); *Urie v. Thompson*, 337 U.S. 163, 180 (1949). In so doing, the Court has recognized that Congress' purpose in enacting the FELA was to "eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, 107 S. Ct. at 1413. Thus, the

[22] For example, amendments in 1910 addressed three different concerns Congress had with judicial administration of the FELA. H.R. Rep. No. 513, 61st Cong., 2d Sess. 3-7 (1910) (citing three cases Congress intended to reverse). Similarly, the 1939 amendment to the FELA was aimed at limiting the defense of assumption of risk, which had extended beyond what Congress considered just in FELA litigation. The House Report accompanying the bill cites twenty-two cases as examples of the unjust application of the assumption of risk doctrine. H.R. Rep. No. 1222, 76th Cong., 1st Sess. 1-7 (1939).

[23] For example, in recent amendments to the antitrust laws, Congress specifically provided that private individuals, the federal government, and state attorneys general, acting as plaintiffs, may recover prejudgment interest. *See* Pub. L. No. 94-349, 94 Stat. 1156 (1980) (codified at 15 U.S.C. §§ 15(a), 15a, 15c(a)(2) (1982)). Similarly, under recent amendments, plaintiffs in trademark infringement cases may recover prejudgment interest. *See* Pub. L. No. 98-473, 98 Stat. 2179 (1984) (codified at 15 U.S.C. §§ 1116(d)(11), 1117(b) (Supp. II 1984)).

Buell Court noted that the coverage of the statute is defined in broad language:

> '*Every* common carrier by railroad . . . shall be liable in damages to *any* person suffering injury while he is employed by such carrier resulting in whole *or in part* from the negligence . . . of such carrier . . . .' 45 U.S.C. § 51.

107 S. Ct. at 1414 (emphasis added). Consistent with this language, the Court has liberally construed the kinds of employees and harms covered, and minimized the degree of employer negligence required for recovery under the FELA.[24] Furthermore, it has rejected attempts by state courts to restrict the railroads' liability on the basis of state procedural or evidentiary rules. *See* cases cited at note 34, *infra*.

However, this liberal approach to questions of liability has not extended to the determination of damages under the FELA. To the contrary, the Court has from the outset limited recovery to the type and measure of damages clearly within the scope of this federal statute. In *Vreeland*, 227 U.S. at 67-68 (1913), for example, the Court early stated that survivors may recover only their pecuniary losses because "[t]he act of 1908 does not provide for any survival of the right of action created in behalf of an injured employee." *Accord American R.R. of Porto Rico v. Didricksen*, 227 U.S. 145 (1913).[25] More recently, the Court has limited recovery for lost earnings to lost earnings net of taxes, noting that under the FELA the measure of recovery flows from loss of pecuniary benefits. *See Liepelt*, 444 U.S. at 493.[26]

[24] *See, e.g., Urie*, 337 U.S. at 181 (FELA coverage is not confined to accidental injuries but includes injuries in the nature of occupational hazards); *Rogers*, 352 U.S. at 506 ("the test of a jury case" is whether the proofs show "that employer negligence played any part, even the slightest" in producing the injury).

[25] In 1910, Congress amended the FELA specifically to extend the types of damages available to survivors. *See supra* note 22.

[26] *See also Tonsellito*, 244 U.S. 360 (father cannot recover for injured son's expenses or loss of services); *Chesapeake & Ohio*

This approach to interpreting the FELA mirrors the purpose of Congress in enacting the statute. The standard of liberal construction on questions of liability reflects congressional recognition that, as between employee and employer, the employer can best bear the financial burden of railroad injuries. *See* S. Rep. No. 460, 60th Cong., 1st Sess. 3 (1908). Thus, the legislative history of the FELA is replete with expressions of congressional intent to expand the liability of the railroads by abolishing or modifying numerous traditional tort defenses.[27] But this same legislative history contains no reference to any intent on the part of Congress to expand the size of the railroads' financial burden for injuries or to give to employees a windfall of a new element of damages. To the contrary, Congress explicitly stated that "[i]t is no part of the purpose of this legislation to oppress or add burdens to the business enterprises of the country, but rather to promote the welfare of both employer and employee." S. Rep. No. 460, 60th Cong., 1st Sess. 3 (1908).

In sum, it is clear that Congress did not intend in the FELA to provide for an award of prejudgment interest. The origins of the FELA, the unwavering line of precedent rejecting prejudgment interest, and the absence of any congressional modification of this aspect of the law over the years all compel this conclusion.

C. The Purportedly Procedural Nature of Rule 238 Does Not Save It from Federal Preemption

The well established rule denying prejudgment interest under the FELA governs this case. As noted previously, it is clear that Congress intended federal law to control on questions of damages under the FELA. *Kelly*, 241 U.S. 485. Prejudgment interest clearly adds to the dam-

Ry. v. Gainey, 241 U.S. 494 (1916) (loss of future earnings must be discounted to present value); *Kelly*, 241 U.S. 485 (future payments must be reduced to present value).

[27] *See* 42 Cong. Rec. 427 (1908) (House debate); 42 Cong. Rec. 4527 (1908) (Senate debate); H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908); S. Rep. No. 460, 60th Cong., 1st Sess. 3 (1980).

ages otherwise available under the statute. Indeed, Pennsylvania describes its Rule 238 as "Damages for Delay" and awards such damages based on the size of the verdict. In *Dickinson v. Stiles*, 246 U.S. 631, 632 (1918), this Court determined that a state's attorney lien statute was not superseded by the FELA because it "affects neither the amount recovered nor the persons by whom it is recovered." By contrast, insofar as Rule 238 awards prejudgment interest only to the plaintiff, it affects both.

Prejudgment interest, moreover, affects the size of the verdict by a sizeable and measurable amount[28]—so much so that the prospect of such an award is likely to cause forum shopping. As the Third Circuit noted in *Jarvis v. Johnson*, 668 F.2d 740, 745 (3d Cir. 1982),

> The existence of Rule 238 has a clear and undeniable effect on the monetary outcome of a suit. Its applicability in a given forum is therefore an influence on decisions of plaintiffs and defendants as to the desirability of bringing or defending litigation in a particular forum.

Even the Pennsylvania Supreme Court has recognized the significant impact of Rule 238. "Rule 238 embodies both procedural and substantive elements. Its purpose and effect are procedural, yet its performance will touch upon substantive rights of both parties." *Laudenberger v. Port Authority*, 496 Pa. 52, 436 A.2d 147, 155 (1981).

Every federal court that has considered the question has rejected efforts to apply state prejudgment interest rules in FELA actions.[29] Indeed, state courts outside of

[28] In this case, for example, the prejudgment interest added to the jury verdict amounted to approximately eighteen percent of the total judgment.

[29] *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1279 (3d Cir. 1987); *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847, 848 (5th Cir. 1944); *Chicago, M., St. P. & P. R.R. v. Busby*, 41 F.2d 617, 619 (9th Cir. 1930); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125, 127 (E.D. Pa. 1984); *Camplese v. Consolidated Rail Corp.*, 594 F. Supp. 44, 45 (M.D. Pa. 1984); *Murphy v. Lehigh Valley R.R.*, 63 F. Supp. 928, 930 (E.D.N.Y. 1945), *modified*, 158 F.2d

Pennsylvania have, with almost perfect consistency, declined to award prejudgment interest in FELA cases—even when applicable state rules otherwise would have required such an award.[30] Furthermore, the federal courts have rejected state prejudgment interest rules not because federal procedure requires that result, but rather because they have concluded that Congress struck a balance in the substantive statute underlying plaintiff's claim—a balance that would be upset by an award of prejudgment interest.[31] As this Court has recognized, "[t]he purpose of Congress is the ultimate touchstone" in deciding whether a federal law preempts a particular state rule or law. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).[32]

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481 (2d Cir. 1946); *see also Lindsey v. Louisville & Nashville R.R.*, 775 F.2d 1322, 1325 (5th Cir. 1985); *Faulkenberry v. Louisiana & Arkansas Ry.*, 449 F.2d 1238, 1244 (6th Cir. 1971); *Earl v. Chesapeake Ohio Ry.*, No. 83-3040, slip op. at 4 (S.D. W.Va. June 26, 1985).

[30] *See* state decisions cited at note 11, *supra*.

[31] *Poleto*, 826 F.2d at 1279; *Wilson*, 803 F.2d at 565; *Carver*, 600 F. Supp. at 126-27; *Camplese*, 594 F. Supp. at 47-48.

[32] Cases arising under the Jones Act, 46 U.S.C. § 688 (1982), also support the proposition that state prejudgment interest laws may not be applied in FELA cases. This statute adopts the provisions of the FELA in connection with personal injury suits, and has been held to have the same interpretation. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958); *Engel v. Davenport*, 271 U.S. 33 (1926). Federal courts interpreting the Jones Act have held repeatedly that state prejudgment interest statutes are preempted by federal law. *See Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972); *Casey v. American Export Lines*, 173 F.2d 324 (2d Cir.), *rev'd on other grounds*, 176 F.2d 337, *cert. denied*, 338 U.S. 885 (1949); *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622 (6th Cir. 1948); *Cortes v. Baltimore Insular Line*, 66 F.2d 526 (2d Cir. 1933); *Duvernay v. Alcoa Steamship Co.*, 217 F. Supp. 698 (E.D. La. 1963). State court Jones Act cases have similarly held that plaintiffs may not recover prejudgment interest on the basis of state rules. *Sutton v. Central Gulf Lines*, 433 So. 2d 888, 894 (La. Ct. App. 1983); *Rains v. Diamond M. Co.*, 396 So. 2d 306, 313 (La. Ct. App. 1981), *cert. denied*, 455 U.S. 938 (1982); *Shemman v. American Steamship*

The court below stands virtually alone in its conclusion that the state's prejudgment interest rule may be applied to FELA cases because of its procedural purpose. *See Morgan*, 518 A.2d at 1177. As three judges emphasized in dissent, the court's reasoning fails to recognize that the preemptive scope of the FELA turns not on the characterization or stated purpose of the state rule, but on the extent to which such rule "meddles" with the Act. *Dickinson*, 246 U.S. at 632; *accord Shaw v. Delta Air Lines*, 463 U.S. 85, 95 (1983); *Brown*, 338 U.S. at 296. Rule 238 is preempted because it legislates upon an issue which is resolved by federal law.

That the FELA will preempt even a state rule which has been characterized as procedural is not a new or surprising proposition. From the outset, this Court in FELA actions has rejected the traditional substance-procedure dichotomy developed in conflict of law cases.[33] In an early FELA case, this Court declared, "In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure." *Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199, 201 (1915). Thus a number of state rules which might be viewed as procedural, or whose principal purpose is in fact procedural, may not be followed in state court FELA actions because these rules would defeat the action altogether, or would unquestionably affect the amount of the recovery. In *Brown*, 338 U.S. at 296, for example, the Court refused to apply an "over-exacting" state rule of pleading, reasoning that "[t]he federal right cannot be defeated by the forms of local practice." *Id.* Similarly, in *Atlantic Coast Line*, 239 U.S. at 201, the Court determined that the federal

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Co., 89 Mich. App. 656, 280 N.W. 2d 852, 861 (1979); *Morris v. Transworld Drilling Co.*, 365 So. 2d 46, 47 (La. Ct. App. 1978).

[33] *See* Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 Ohio St. L.J. 384, 386 (1956).

statute of limitations must apply in a state court FELA action because Congress had "made its will plain" and the Court could not allow "substantive rights to be impaired [in] the name of procedure." On the question of whether to instruct a jury concerning the impact of taxes on an FELA award, the Court followed federal and not state law, since the issue "unquestionably affected," and was "demonstrably relevant" to, the measure of damages. *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 495 (1980).[34]

The Court's approach to determining whether federal or state law is applicable in an FELA action has been likened to the "outcome determinative" test, applied under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). *See* Hill, *supra* note 33. Under that test, federal courts sitting in diversity situations consistently hold that a rule granting prejudgment interest is outcome-determinative and, in the converse of the case at bar, apply state prejudgment interest rules.[35] Indeed, the Third Circuit will follow Rule 238 when deciding a case under Pennsylvania law because of the substantive impact of this rule on the verdict:

> While Rule 238 may have been designed to expedite the processing of litigation in Pennsylvania, its application nevertheless results in increasing the

[34] *See also Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) (allocation of functions between court and jury may not be determined on the basis of state law because this might defeat federal rights); *Central Vermont Ry. v. White*, 238 U.S. 507 (1915) (Vermont practice with respect to burden of proof not applicable where it might bar FELA remedy).

[35] *See Jarvis v. Johnson*, 668 F.2d 740, 745 (3d Cir. 1984); *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 855 (D.C. Cir. 1981); *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 633, 637 (7th Cir. 1981); *Clissold v. St. Louis-S.F. Ry.*, 600 F.2d 35, 39 n.3 (6th Cir. 1979); *Plantation Key Developers, Inc. v. Colonial Mortgage Co.*, 589 F.2d 164, 170-72 (5th Cir. 1979); *Roy v. Star Chopper Co.*, 584 F.2d 1124, 1135 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

> amount of damages a plaintiff can receive and a defendant must pay, over the amount of damages that would be awarded in the absence of the Rule . . . .
>
> [T]he difference between the application and the nonapplication of Rule 238 in terms of a plaintiff's ultimate recovery can be quite substantial. Indeed with jury verdicts in many classes of cases running into six and seven figures, prejudgment interest can represent a not inconsiderable portion of a plaintiff's damages.

Jarvis, 668 F.2d at 745. In view of the fact that Rule 238 has a sufficiently substantial and foreseeable effect on the outcome to require its application in a federal diversity case, its impact cannot be ignored in an FELA state court case when it conflicts with the controlling damage principle of the FELA.

Of course, the *Erie* test may not describe the outer limits of the preemptive effect of the FELA. Additional considerations beyond those presented in *Erie* are involved when federally created rights are entertained in state courts. Unlike *Erie*, where the Court was concerned with an absence of federal law and therefore turned to conflicts principles to find applicable law, in FELA actions there is a controlling federal law which sets forth rules and principles that are "paramount and exclusive," *Michigan Central R.R. v. Vreeland*, 227 U.S. 59, 67 (1913), and can be "neither . . . extended nor abridged by common or statutory laws of the State." *Tonsellito*, 244 U.S. at 362. Thus, realization of congressional intent may require that federal rules be followed in the state courts in FELA cases even though an *Erie* analogy might lead to a different conclusion.[36] At a minimum, however,

[36] For example, in *Brown*, the Court applied the federal pleading rule in an FELA action arising in state court, even though Justice Frankfurter, dissenting, complained that the Court's action could not be defended under the *Erie* standard. 338 U.S. at 301.

a state rule, such as Rule 238, which *does* determine the outcome of an FELA action, cannot be followed when federal law under the FELA is to the contrary.

The federal scheme established by the FELA for awarding damages to railroad employees is both exclusive and paramount. Under that scheme, prejudgment interest is unavailable, not as a matter of federal procedural law, but because it conflicts with the balance struck by Congress at the time this statute was passed. Because the rule denying prejudgment interest is an integral part of the federal statutory scheme on which the plaintiff's claim is predicated, it cannot be contradicted or undermined by a state rule, whatever its stated purpose. As the overwhelming majority of federal and state courts have concluded, the question of prejudgment interest under the FELA is controlled by federal law. The decision of the Pennsylvania Supreme Court to the contrary should be reversed.

II. THE COURT IN AN FELA ACTION MAY NOT REFUSE TO INSTRUCT THE JURY THAT AN AWARD FOR FUTURE LOSSES MUST BE REDUCED TO PRESENT VALUE

This case also presents the question of whether a defendant in an FELA case is entitled to an instruction that the jury's award should reflect only the present value of any future losses the plaintiff sustains. The court below refused such an instruction based on *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027, 1038-39 (1980), a decision in which the Supreme Court of Pennsylvania instructed the courts of that state to "abandon the practice of discounting future lost earnings" to present value because "as a matter of law . . . inflation shall be presumed to equal future interest rates with these factors offsetting." The court below plainly erred by following this state-prescribed "total offset" rule, instead of the clear rule under the FELA entitling a defendant to a present value instruction.

A. This Case Is Controlled by the Court's Recent Decision in *St. Louis Southwestern Ry. v. Dickerson*

Over seventy years ago, this Court determined that any recovery under the FELA for loss of future payments must be reduced to present value: "the ascertained future benefits ought to be discounted in the making up of the [FELA] award." *Kelly*, 241 U.S. at 490. It based this decision upon two basic principles. First, damages should be "equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased." *Kelly*, 241 U.S. at 489 (citing *Vreeland*, 227 U.S. at 70).[37] Second, "a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages. . . . And the putting out of money at interest is at this day so common . . . it cannot be excluded from consideration . . . ." *Kelly*, 241 U.S. at 489-90.

Just two years ago, this Court reaffirmed the ruling in *Kelly*, emphasizing that it applies whether FELA cases are tried in state or federal court. In *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985), the Court summarily reversed a decision of a state court which refused to instruct the jury that future payments in an FELA action must be reduced to present value. The trial judge in *Dickerson* had declined to submit to the jury an instruction that "its award to the plaintiff should reflect the present value of any future losses the plaintiff should sustain" on the ground that "such an instruction was not provided for in the Missouri Approved Instructions promulgated by the Supreme Court of Missouri." *Id.* at 410. In reversing the state court de-

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[37] *Accord Norfolk & Western Ry. v. Holbrook*, 235 U.S. 625 (1915); *Gulf, Colorado & Santa Fe Ry. v. McGinnis*, 228 U.S. 173, 175 (1913); *American R.R. of Porto Rico v. Didricksen*, 227 U.S. 145, 149 (1913).

cision, the Court reiterated that questions of damages under the FELA are controlled by federal law, and under federal law a defendant is entitled to a present value instruction. *Id.* at 411.

This case is controlled by *Dickerson*. The trial judge in the case below not only declined to give a present value instruction, but told the jury that its award need not reflect the present value of future losses:

> Now, it used to be in these cases the Court would instruct the jury that any moneys that would be awarded to the plaintiff would be reduced to something called present worth. The law now provides that there need not be such a reduction . . . . By the result of a court decision, the inflation rate and present worth have been equated with each other . . . .

Trial Transcript at 701-02.

The court based its view on the law of the forum state.

> THE COURT: On the issue of present worth, we have spent considerable time, as both counsel knows [sic], considering this matter; and we do think that it is a very narrow issue; and that the law as we see it is far from clear; however, we have reached the decision not to give the present-worth charge; and the basis for the Court's decisions is the Bolubase [sic] Decision and the decision of Justice Nix.
>
> As we read his language, it appears to me that what he is doing is establishing, really, a procedural method for calculating an award for loss of future earnings; and that if you look at his opinion as being procedural, then it seems to me that it would be applicable.
>
> The other reason that compels the Court is that there is dicta in a number of these cases to the effect that until there has been some clear decision in FELA cases by the United States Supreme Court, the law of form [sic] should apply.

Trial Transcript at 577.

This ruling squarely conflicts with this Court's holding in *Dickerson* on two counts. First, *Dickerson* holds that "the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." 470 U.S. at 411. But the trial court here followed Pennsylvania state law.

Second, the *Dickerson* Court determined that "not only is it a federal question, but it is also one to which existing law provides a clear answer. . . . '[W]hen future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.'" *Id.* (quoting *Kelly*, 241 U.S. at 491). In this case, however, the trial court's statement represents "an utter failure to instruct the jury that present value is the proper measure of a damage award." *Id.* Indeed, the court below not only refused to give such an instruction, but specifically instructed the jury not to consider the present value of the award. This ruling cannot stand under *Dickerson*.

B. The Efforts of the Pennsylvania Courts to Recharacterize the Trial Court's Ruling on the Basis of *Jones & Laughlin Steel Corp. v. Pfeifer* Do Not Suffice Because *Pfeifer* Is Not Directly Applicable to Jury Trials Under the FELA

The Supreme Court and Superior Court of Pennsylvania attempted to save the ruling of the trial court with the claim that the judge made a "deliberate choice" of the "total offset" method when it followed a method which had been "deliberately selected by [the Pennsylvania Supreme Court]."[38] Thus, according to these state appellate courts, the ruling of the trial judge passes muster under this Court's holding in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). These efforts fail on the facts: the trial court clearly felt bound by state law and did not make a deliberate choice between different methods of discounting to present value.[39]

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[38] *Morgan*, 518 A.2d at 1176; *see also Morgan*, 489 A.2d at 260.

[39] The decisions of the Pennsylvania appellate courts also do not satisfy *Pfeifer*. This Court has never indicated that a decision

Pfeifer is, moreover, inapposite to the present case as a matter of law. The Court's decision in *Pfeifer* was strictly limited to construing section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b) (1982). *Pfeifer*, 462 U.S. at 547 ("[w]e limit our attention to suits under § 5(b)"). The cause of action arising under Section 5(b) of the LHWCA is rooted in federal maritime law rather than ordinary tort law. *Pfeifer*, 462 U.S. at 547; *see also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). One consequence of this is that jury trials are not available under the LHWCA.[40] By contrast, jury trials are available under the FELA, and many cases, like the case at bar, are decided by juries.

This is a crucial distinction for two related reasons. First, because *Pfeifer* was a bench trial, it was appropriate for the court, as trier of fact, to consider evidence of the various factors which go into a determination of a discount rate. Indeed, the Court made numerous references to the fact that the problem of measuring damages was one for "the trier of fact." *Pfeifer*, 462 U.S. at 536, 538. The case below, on the other hand, involved a jury trial, in which it was not appropriate for the judge to impose on the trier of fact a particular discount rate—in this case zero—by telling the jury that, under Pennsylvania law, there need not be a reduction of damages to present worth.

As this Court long ago recognized, in an FELA action the jury, and not the court, must determine the appropriate discount rate and the court may not give "conclusive force" to any one rate. *Kelly*, 241 U.S. at 492 (referring to *Vicksburg and Meridian R.R. v. Putnam*, 118 U.S. 545 (1886)). Likewise, in *Louisville & Nashville*

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by a court other than the trier of fact, having the record before it, would suffice as a "deliberate choice" of discount methods.

[40] *See Bynum v. Patterson Truck Lines*, 655 F.2d 643, 644 (5th Cir. 1981).

R.R. v. Holloway, 246 U.S. 525, 528 (1918), the Court held that the defendant was not entitled to have the jury instructed that the time value of money should be measured by a specific rate of interest.[41] The court below erroneously invaded the province of the jury by imposing a particular method of, or rate for, reducing the award to present value.

Second, a judge sitting as trier of fact is aware, without a specific instruction on the point, that the plaintiff may receive only the present value of future payments. From that starting point, the judge may consider evidence concerning the appropriate rate of discount, as *Pfeifer* indicates. 462 U.S. at 538, 547. By contrast, when a jury is the trier of fact, it is not presumed to know the law concerning the measure of damages under the FELA, and thus it must be instructed to reduce any award based upon future earnings to present worth. An "instruction," such as the one at bar, which indicates to the trier of fact that present value is not a relevant consideration, is inappropriate under the FELA.

The need to instruct the jury in an FELA case with respect to present value does not depend upon the existence of expert evidence relating to the appropriate discount rate. In *Kelly*, the Court said that "in *all* cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award." 241 U.S. at 490 (emphasis added).

More recently, the Court has insisted on a reduction to present worth, even when neither party has introduced evidence into the record concerning the appropriate dis-

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[41] Lower courts have continued to respect the jury's province in this regard. *See, e.g., Woodling v. Garrett Corp.*, 813 F.2d 543, 558-59 (2d Cir. 1987); *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 760-61 (5th Cir. 1979); *Bach v. Penn Central Transp. Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974); *Caskey v. Village of Wayland*, 375 F.2d 1004, 1007-09 (2d Cir. 1967).

count rate. *Dickerson*, 470 U.S. at 411; *Pfeifer*, 462 U.S. at 527.[42] In *Dickerson*, for example, the respondent specifically argued that a present value instruction need not be given because petitioner "chose not to introduce any evidence whatsoever as to the present worth of future lost earnings." [43] In response, petitioner contended that "no evidence or offer of proof need be introduced to support a present value instruction." [44] Despite the specific objection that no discount evidence was presented, this Court found that defendant was entitled to a present value instruction. *Dickerson*, 470 U.S. at 411.[45]

Whatever may be the appropriateness of a "total offset" method in certain instances,[46] the trial court's in-

[42] In this case, defendant in fact bolstered the request for a present value instruction by noting that the jury should use the present value tables noticed judicially by the court in *McCray v. Illinois Central R.R.*, 12 Ill. App. 2d 425, 139 N.E.2d 817 (1957). *See* Joint Appendix at 68a-69a.

[43] Brief for Respondent at 12, *Dickerson*, 470 U.S. 409 (No. 84-914).

[44] Reply Brief for Petitioner at 7, *Dickerson*.

[45] Moreover, obtaining and preparing expert witnesses could be quite burdensome, especially if the factual issue turns on the difference between wage inflation and the interest rate. *See Pfeifer*, 426 U.S. at 445. The majority of the Circuits considering the question therefore require a present value instruction even if no evidence on a discount rate has been introduced. *See DeChico v. Metro-North Commuter R.R.*, 758 F.2d 856, 859-60 (2nd Cir. 1985); *Heater v. Chesapeake & Ohio Ry.*, 497 F.2d 1243, 1249-50 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974); *Duncan v. St. Louis-San Francisco Ry.*, 480 F.2d 79, 87 (8th Cir.), *cert. denied*, 414 U.S. 859 (1973)); *Pennsylvania R.R. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961); *but see Aldridge v. Baltimore & Ohio R.R.*, 789 F.2d 1061 (4th Cir. 1986), *petition for cert. filed*, No. 86-7035, 56 U.S.L.W. 3081 (U.S. June 23, 1987); *Alma v. Manufacturers Hanover Trust*, 684 F.2d 622, 626 (9th Cir. 1982). In *Alridge*, the AAR has filed a brief *amicus curiae* in support of petitioner.

[46] Of note, the evidence before the Court in 1983 when *Pfeifer* was decided reflected data developed during the inflationary 1970's, and thus was somewhat supportive of the offset theory. *See* 462

struction here is clearly contrary to the rule of *Dickerson* and *Kelly*: under the FELA awards based on future payments must be reduced to present value. As the Court stated in *Kelly*, "it is self-evident that a given sum of money is worth more than the like sum of money payable in the future." 241 U.S. at 489. If a plaintiff seeks to reverse this self-evident rule, at a minimum, it has the burden of presenting evidence that no reduction is necessary—a burden that was not met here.[47]

In sum, the Pennsylvania appellate courts lost sight of the narrow focus of *Pfeifer* on bench trials and extended that decision beyond the boundaries erected by this Court. If there is a "deliberate choice" of discount methods to be made under the FELA, it is for the jury and not the trial judge. Furthermore, it is clear that under *Dickerson* it is error to decline to instruct the jury in an FELA case that an award must be reduced to present value. The court below violated both of these basic principles.

U.S. at 539 (citing Carlson, *Economic Analysis v. Courtroom Controversy: The Present Value of Future Earnings*, 72 A.B.A. J. 628, 630 (1976)). The Carlson article is based principally upon the *Economic Report of the President* 287, 317 (Feb. 1975), and shows wage increases exceeding the yield on taxable government bonds. The more recent indicators are to the contrary. In 1986, the average nonagricultural employee's wages increased from the prior year by only 2.6 percent, *Economic Report of the President* 295 (Jan. 1987), as compared to the 9.03 percent annual rate reported by the Federal Reserve for seven-year government bonds in January 1986. *Federal Reserve Bulletin* A24 (May 1986). Thus, in light of the changing trends in inflation and interest rates, it is clear that some examination of the current facts is necessary before a trier of fact may adopt a total offset method. Here, however, there was no such examination.

[47] *See Metz v. United Technologies Corp.*, 754 F.2d 63, 68 (2d Cir. 1985) ("In each of these cases the court expressly held on the evidence presented that the rate of inflation and the nominal rate of interest were almost equal and offset each other. . . . Here the parties presented no evidence on inflation and discount rates. The district court therefore could not have applied an offset method.").

CONCLUSION

For the foregoing reasons, the Court should declare that a state court may not award prejudgment interest in an FELA action, and that an FELA defendant is entitled to have the jury instructed that its award to plaintiff should reflect only the present value of any future losses.

Respectfully submitted,

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APPENDIX

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Metro North Commuter Railroad Company
MidSouth Rail Corporation
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company

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National Railways of Mexico